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# Resolving Land Disputes through Restitution Dynamics: A Comparative Analysis of Country Case Studies

University of Chicago Law School - International Human Rights Clinic

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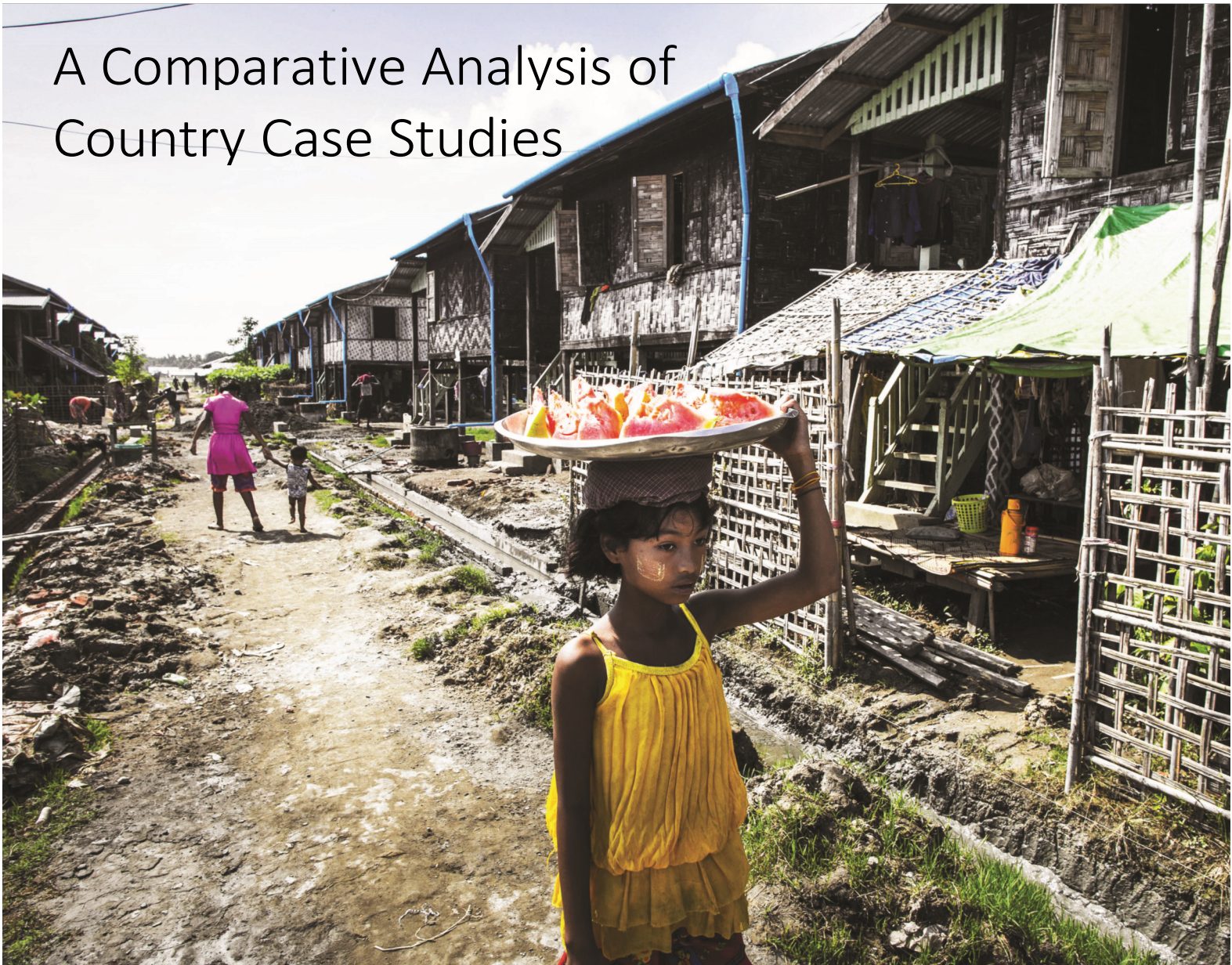
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2017

# Resolving Land Disputes Through Restitution Mechanisms:

## A Comparative Analysis of Country Case Studies



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## EXECUTIVE SUMMARY

This Report aims to support current efforts in Myanmar to address land ownership and land use disputes. Shifts in government administration, inconsistent legal property regimes, inadequate administrative recordkeeping, and unregulated government land seizures have resulted in wide spread conflicting claims to land. These have caused regional instability, internal population displacement, conflict and socio-economic distress. Resolution of these disputes through a restitution mechanism and establishment of a cohesive land ownership and use regime is central to ultimately establishing rule of law and respect for human rights as well as to the long-term economic development of Myanmar.

As stakeholders engage in discussions about whether, when, and how to adopt a land restitution program as a component of more comprehensive land reform policies, best practices and lessons learned from other countries can provide useful reference points. This Report provides that research using international law and best practices as the analysis framework. Six comparable countries - Bosnia and Herzegovina (BiH), East Timor, Indonesia, Iraq, Kosovo, and Zimbabwe - were selected for investigation due to relevant similarities to Myanmar's context. These comparators represent post-conflict and/or post-colonial environments; have a significant number of refugees and internally displaced persons (IDPs); and/or have substantial regional variation throughout the country that calls for a land restitution approach that incorporates relevant regional distinctions.

- ❖ ***Bosnia & Herzegovina*** established a land restitution mechanism following regional conflict in the 1990s. The mechanism sought to incorporate regional historical practices into restitution mechanisms, account for potential local obstruction, and address claims on residential and non-residential land.
- ❖ ***East Timor*** undertook land restitution after the conclusion of internal conflict. Lacking a robust land governance infrastructure, the process focused on interim measures, informal mediation, and incorporation of customary tenure.
- ❖ ***Indonesia*** has sought to recognize the rights of unregistered owners that are insecure and that heavily impact traditional communities. It is in the process of comprehensively reforming its legal and regulatory framework.
- ❖ ***Iraq*** attempted to establish a land restitution program following the 2003 overthrow of Saddam Hussein. Ongoing violence and conflict presented a severe challenge as did the failure to undertake an integrated, cohesive, and inclusive approach. The selection of a former judicial process also proved more cumbersome and slower than an administrative one.



- ❖ ***Kosovo's*** process mirrored that of BiH but had unintentional discriminatory effects on ethnic groups. It also was hampered by poor cooperation and interaction between agencies, particularly at the outset of the land restitution program.
- ❖ ***Zimbabwe*** undertook radical land reform in an attempt to establish equity between ethnically “white” landowners and “black” farmers. The process was marred with numerous challenges and lead to various human rights violations. It also demonstrated the difficulties with purely consensual land reform policies.

Using international frameworks such as the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles) as guidance, this report identifies twenty-two principles that measure the efficacy and success of these restitution programs. Through this analysis, various practices and considerations for Myanmar emerge as described in detail below.

### Summary of Lessons Learned<sup>1</sup>

1. **Define the Scope:** Properly defining the scope and providing a clear timeline for land restitution efforts facilitates effective implementation.
2. **Flexibility and Evolution:** Approaches that are flexible and change as needs evolve tend to be more impactful.
3. **Determine Formality of Mechanism:** Administrative, judicial, or informal approaches or some combination of the three should be used as appropriate to the particular context.
4. **Incorporate Traditional Land Rights:** Traditional land rights should be accounted for in restitution mechanisms.
5. **Consider Use of Customary Institutions:** Traditional, local, and/or customary institutions can provide fora for implementation of a restitution mechanism.
6. **Adopt Local, Regional and Federal Approach:** Local, regional and federal strategies should be incorporated into a land restitution policy to ensure proper coordination.
7. **Consider a Staggered Approach:** Where stability of the country and capacity of the government is not reliable, mechanisms that upscale in stages may be preferable.
8. **Account for Long-Term Institution Building:** Long-term institution building should be a component of mechanism to ensure sustainability and effective transitions.
9. **Potential for Interim Protections:** Weigh the advantages and disadvantages of interim and transitional protections which may provide more immediate needed relief.
10. **Land Restoration or Compensation:** The type of redress provided should be tailored to community, needs and circumstances of recipient and take into account relevant factors such as use of land and access to financial institutions.
11. **Consider Implications of Definitional Choices:** Making deliberate choices about legal definitions to avoid unintended future consequences.
12. **Resolve Existing Conflict of Land Laws and Policy:** A survey of existing land laws and policies should identify inconsistent or conflicting laws and either remedy them or identify which take priority.
13. **Address Human Rights and Ensure Non-Discrimination:** Design of a mechanism should include ongoing assessment of potential for discrimination and adverse human rights impact in compliance with international standards.

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<sup>1</sup> For complete lessons learned, see Section VI.

## Summary Assessment Chart <sup>2</sup>

### ASSESSMENT OF LAND RESTITUTION EFFORTS BASED ON UN PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS (PINHEIRO PRINCIPLES))

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Success</i>	Moderate	Moderate	Too soon to tell	No	Low-moderate	No
<i>Transparency</i>	Moderate	Moderate	Moderate	Moderate	Moderate	N/A
<i>Public access facilitated by state</i>	Yes	Yes	Yes	Yes	Yes	N/A
<i>Transparency (creation)</i>	N/A	Transparent	Relatively transparent	Low	N/A	High
<i>Transparency (individual disputes)</i>	N/A	Relatively transparent	N/A	High	N/A	N/A
<i>Non-discrimination</i>	High	Moderate	Moderate	Low	Low-moderate	Low
<i>Gender-sensitivity</i>	Low	N/A	N/A	Low	Low	N/A
<i>Eligible property</i>	All	All land	Agrarian land	All real estate	Residential	N/A
<i>Proper staffing</i>	Yes	Yes	Too soon to tell	No	Yes	No

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<sup>2</sup> For detailed Assessment Chart, see Appendix A.



	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Proper funding</i>	Yes	Yes	Yes	No	Yes	No
<i>Agency independence</i>	High	Moderate	Moderate	Moderate:	High	Low
<i>Standardized process</i>	Yes	At the outset, yes	Unclear	Yes	Yes	No
<i>Submission of IDP Claims</i>	High	Low-moderate	N/A	N/A	High	N/A
<i>Resolution of IDP Claims</i>	High	N/A	N/A	Low	High	Moderate
<i>Community consultation</i>	N/A	High	Moderate	Low	Low	Low
<i>Land registration mechanism</i>	Moderate	N/A	High, but ineffective	High	Moderate	N/A
<i>Recognition of customary land</i>	High	High	High	Low	Low	Low
<i>Recognition of undocumented claims</i>	N/A	N/A	N/A	Low	N/A	N/A
<i>Recognition of secondary occupants</i>	Yes	N/A	N/A	Yes	Yes	No
<i>Rule of law</i>	Yes	Yes	Yes	Yes	Yes	No
<i>Clear restitution prioritization</i>	Yes	N/A	Yes	Yes	Yes	No

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Favored form of restitution</i>	Restoration	Selling, leasing, dividing, or swapping land	Restoration	Restoration	Restoration	N/A
<i>Independence, if monetary</i>	N/A	N/A	N/A	N/A	N/A	N/A
<i>Opportunity for compensation, if restoration</i>	No	N/A	No	No	Sometimes	N/A

## INTRODUCTION<sup>1</sup>

Reform of land governance and tenure systems in countries emerging from conflict can present numerous challenges. Myanmar is currently undergoing a political reform process that is transitioning the nation from an era of strong state control towards relative democracy. Although the economy is rapidly developing, Myanmar continues to face multiple prolonged internal conflicts, such as the ongoing crisis involving the Muslims in Rakhine State. Along with political transition comes widespread social and economic changes as well as legal and institutional reform. Land governance and dispute resolution systems in a post-conflict society merit careful planning and focused implementation. However, since myriad societal transformations that affect land tenure are occurring simultaneously, forming an effective approach to issues of land governance can be complicated. While each reform process faces unique challenges and dynamics, comparative case studies and international guidance can serve as useful touchstones. This report seeks to support land restitution, land reform, and dispute resolution efforts in Myanmar through an exploration of comparative case studies and international standards.

The report proceeds in five parts: Part I provides a brief summary of the socio-political climate of Myanmar in which property determinations are taking place; Part II discusses the relevant international legal landscape; Part III explores domestic factors in Myanmar that relate to its attempts to undertake land restitution and land reform; Part IV summarizes applicable domestic laws; Part V presents comparative case studies from six countries (Bosnia & Herzegovina, East Timor, Indonesia, Iraq, Kosovo, and Zimbabwe) with relevant recent experiences with land restitution and land reform; and Part VI concludes by synthesizing insights and lessons learned in these countries to the Myanmar context.

## PART I: BACKGROUND

In 1948, the then Union of Burma, a political formation comprised of many previously quasi-independent territories, declared independence from Britain and became a parliamentary democracy.<sup>2</sup> However, the Union of Burma suffered from ongoing ethnic strife that still persists today.<sup>3</sup> During the 1947 Panglong Conference Aung San, head of interim Burmese government, met with ethnic minority leaders to discuss unification.<sup>4</sup> Aung San and ethnic leaders agreed that the new Union of Burma would be governed in a model that would retain significant autonomy and rights for ethnic minority areas, and in return these ethnic minorities would be loyal to the new state.<sup>5</sup> However, in 1947, when Aung San was assassinated by a rival for the country's leadership, Panglong was set aside and the new state was created in the midst of civil war.<sup>6</sup>

Following independence from the United Kingdom, the Union first operated as a representative democracy.<sup>7</sup> This government lasted until the military coup of 1962, when the



armed forces took power from the parliamentary government and replaced it with a military junta.<sup>8</sup> The coup, led by General U Ne Win, led to isolationist policies with a socialist economic program.<sup>9</sup> In response to a rapidly deteriorating economy, mass protests occurred in August of 1988 and the army killed at least three thousand protestors.<sup>10</sup> Ne Win resigned and military junta succeeded in a coup a month later.<sup>11</sup>

Following two decades fraught with domestic political protests and international sanctions, a general election was held in 2010.<sup>12</sup> In 2011, the military junta was officially dissolved and a civilian government was installed.<sup>13</sup> The government signed the National Ceasefire Accord with eight armed ethnic groups in October of 2015.<sup>14</sup> In November 2015, Aung San Suu Kyi's party, the National League for Democracy, won a landslide election victory.<sup>15</sup>

Myanmar's transition to democracy has come with the need for various reforms, in particular related to land restitution and land claim dispute resolution. A history of complex and inconsistent property allocation and ownership regimes as well as government seizures of private property have led to conditions of competing claims on land that are difficult to resolve. The resolution of these claims is complicated by a number of factors that vary greatly from region to region, including a lack of administrative records on land ownership and use; power imbalances at various levels of society; human rights abuses; and a rapid increase in foreign investment.<sup>16</sup>

Moreover, as a result of decades of civil conflict, Myanmar has a high population of Internally Displaced Persons (IDPs). After the signing of the October 2015 ceasefire, displaced peoples in the southeast are beginning to consider the prospects of returning home, and finding their land confiscated and transferred to private companies or otherwise occupied by individuals with competing land claims.<sup>17</sup> The northeast faces a different set of challenges. Only eight ethnic armed groups signed the ceasefire; many of the militarily powerful groups did not sign, and there is intense fighting in the northeast.<sup>18</sup> This violent conflict is causing new displacement. As Myanmar works towards building peace and sustainable development, resolution of land tenure disputes and restitution is crucial.

## PART II: LAND TENURE DISPUTES AND INTERNATIONAL BEST PRACTICES

### 1) FUNDAMENTALS OF LAND TENURE

Land tenure, as defined by the Food and Agriculture Organization (FAO), is “the relationship . . . among people . . . with respect to land and other resources.”<sup>19</sup> In general terms, land tenure systems determine who can use the resource of land, for how long, and under what conditions. The rules of land tenure vary across and within countries, and disagreements regarding these rules are often at the heart of land conflict.

There are generally four categories of rights in land tenure mechanisms: (1) private, (2) communal, (3) open access, and (4) state.<sup>20</sup> *Private rights* are assigned to a private party, while *communal rights* allow each member of the community to use the land and resources of the community (but non-community members may be excluded). *Open access* describes a tenure where specific rights are not assigned to any individual but no one can be excluded, and *state tenure* is when rights are assigned to a public sector entity, either for public purpose use or for leasing to earn an income.<sup>21</sup>

Land is often governed by two forms of tenure—statutory (or formal) tenure and customary tenure.

#### A. Formal Tenure

*Statutory tenure* includes freehold, leasehold, public, and private rental, with freehold rights being the strongest form of statutory rights. Forms of statutory tenure are regulated by the government, laws, and institutions, and land rights are usually registered in land administration systems.<sup>22</sup> On a spectrum of land tenure, registered freeholds have the greatest security of tenure, meaning that the land users with this land tenure have the most confidence that they will not be deprived of the rights they enjoy over land and the economic benefits that flow from it.<sup>23</sup> However, many countries also have customary tenures instead of, or in addition to, statutory tenure.

#### B. Customary Tenure

*Customary tenure* includes multiple forms of community land rights and resource access and use rights; these rights are vested in a community, ethnic group, or family.<sup>24</sup> Unlike statutory tenures, which are regulated by the state, customary land rights are controlled by traditional authorities such as chiefs and elders. While statutory land rights have legal legitimacy, customary land rights sometimes have legal legitimacy, and sometimes just enjoy widespread

social legitimacy.<sup>25</sup> Customary tenure is the predominant form of tenure in many rural areas and indigenous communities.<sup>26</sup>

Advantages to customary tenure are wide social acceptance and practice in certain parts of the world. Customary tenure is simple to administer and readily adaptable to changing circumstances, including conflict, and these institutions may be more resilient after conflict.<sup>27</sup> On the other hand, the advantages of customary tenure lend themselves to limitations. For example, the simplicity of customary institutions may cause them to more easily break down during conflict and lose legitimacy.<sup>28</sup>

Both customary and statutory tenure schemes can raise various concerns about accountability and human rights, specifically women's rights. Often, customary land rights may not be enforced in court, which contributes to insecurity of tenure. In addition, the accountability of traditional authorities, the managers of land under customary tenure, may be weak or may become weak.<sup>29</sup> When this happens, there is little recourse through federal government mechanisms and this allows potential for abuse by customary leaders in resolving claims. However, diminished trust in institutions in conflict areas and widespread corruption mean that similar problems can arise with statutory tenure as well.<sup>30</sup> Furthermore, women's land rights are often secured through male relations under systems of customary tenure, exacerbating the inequality between men's and women's access to land.<sup>31</sup> As discussed in Part II.4.B, statutory tenure schemes often result in bias against women, as well, for example by favoring male heads of household when registering land.

## **2) LAND TENURE AND PROPERTY RIGHTS**

Land tenure, as described above, is to be distinguished from property rights. The rules of tenure regulate people's and organizations' relationship to land, whether legally or customarily defined, and thus they define how property rights to land are to be allocated within society.<sup>32</sup> Property rights include rights to use, control, and transfer land, as well as responsibilities and restraints associated with these land property rights.<sup>33</sup> Property rights define and are more commonly recognized and protected by statutory law and can include rights over physical objects, such as houses.<sup>34</sup> In sum, land tenure determines how land is used, possessed, leveraged, sold, or disposed of, whereas property rights concretely define rights to land of individuals, communities and organizations.<sup>35</sup>

The term "housing, land, and property rights" (HLP) is often used by the humanitarian sector in conflict situations.<sup>36</sup> The concept of HLP is captured in international human rights law within the right to adequate housing.<sup>37</sup> This term is designed to ensure that vulnerable groups are not excluded from protection, and to ensure that all housing, land, and property rights are respected and protected in times of insecurity and conflict.<sup>38</sup>



### **3) AVAILABLE MECHANISMS FOR LAND RESTITUTION**

When populations have been dispossessed of their land, there are several possibilities for restitution. The two primary forms of land restitution mechanisms are restoration and compensation.<sup>39</sup>

#### **A. Restoration**

Land restoration is when the dispossessed party is allowed to return to his or her own land. Restoration is intended to return displaced populations to the *status quo* and, in theory, undoes any forced displacement of populations and ethnic groups that occurred during a conflict. This is generally considered the favored type of restitution policy.<sup>40</sup> It is favored for practical reasons (many countries undertaking land restitution do not have sufficient funds to effectively compensate all displaced persons), theoretical preferences (only restoration truly embodies the concept of “restorative justice” or allows individuals to “re-assert” rights over their land), and substantive concerns about compensation (a fear that providing money to displaced persons will appear as though the government is sanctioning forced displacement, that monetary compensation may have unintended consequences or that compensation may impede people from returning to land to which they may have spiritual, social, or cultural connections).<sup>41</sup> Though it may be considered the better alternative, there are significant policy concerns about land restoration such as the unintentional discriminatory impact on women where informal land ownership of the male head of household is formalized in such a way that marginalizes female family members’ equal right to ownership. Another concern occurs when displaced persons originating from rural areas were displaced at a young age and have become accustomed to urban environments and so returning to their rural land does not fit their intended lifestyle.<sup>42</sup>

#### **B. Compensation (monetary)**

Monetary compensation occurs when a dispossessed party cannot return to his or her land but is provided an amount of money, generally by the government, for the land. For the reasons discussed, compensation is generally disfavored and is considered mainly where restoration is not possible or for secondary occupants (those who moved onto land in good faith after the original possessor was displaced); the Pinheiro Principles (later discussed) also suggest that the best policy can be a well-crafted balance between the two, where individuals have a choice to either restoration or monetary compensation.<sup>43</sup> Besides the reasons already discussed for why restoration is preferred, there can be specific practical barriers to monetary compensation. These include a lack of knowledge by recipients in maximizing use of capital, investment or access to financial institutions to ensure security of compensation received.<sup>44</sup>

### **C. Compensation (land)**

Restoration of original land and monetary compensation are the two primary policy choices contemplated by literature for land restitution. Another possible approach is compensation not in money but rather in land such that the party receives other land to compensate for the previous land.<sup>45</sup> There are practical barriers to this type of policy: for a government to undertake an “in kind” compensation scheme, unused land must be identified. This policy choice, therefore, is often undertaken as part of not just a land restitution process but a more ambitious land redistribution and reform. In the Zimbabwe case (discussed in detail in Part V.8), land was taken from “white” landowners and redistributed to “black” farmers. This type of land reform can also occur as part of a socialist government policy where the government makes land public, such as in Bosnia and Herzegovina and Kosovo under the former Yugoslavia (discussed in detail in Parts V.3 and V.8) as well as a number of Latin American countries such as Peru and El Salvador.<sup>46</sup>

#### **4) LAND GRIEVANCES IN POST-CONFLICT ENVIRONMENTS**

Disputes over land and resources may contribute to conflict and result in delaying peace-building post-conflict. For example, land issues have played an integral role in all but three of the greater-than-30 intra-state conflicts that have occurred in Africa since 1990.<sup>47</sup> However, land disputes are often seen as too politically sensitive or too technically complicated to allow for comprehensive resolutions yet failures to resolve these disputes often lead to a higher chance of relapse into conflict.<sup>48</sup>

Post-conflict land grievances can be sorted into two broad categories: (1) grievances related to access, use, and control of land and resources, and (2) grievances that relate to security of tenure. In the first category, common access-related disputes result from evictions or displacements that have forced communities to move from locations they traditionally inhabit, unequal distribution of land within society and land concentration among the elite, contested access to, and use of, fertile land, exclusive control of high-value natural resources, and denial of access to land with social, cultural, or religious significance or indigenous land claims.<sup>49</sup> In the second category, factors contributing to insecurity of tenure include rapid urbanization, expansion of land markets and the individualization of land rights held under customary systems, non-transparent investment in, or capture and control of, land and resources, and new laws that are perceived to impact land rights of either elites or communities.<sup>50</sup>

## **5) INTERNATIONAL HUMAN RIGHTS LEGAL FRAMEWORK ON LAND OWNERSHIP**

As explained above, land rights include the rights to occupy, enjoy, and use land and resources; restrict or exclude others from land; transfer, sell, purchase, grant or loan; inherit or bequeath; develop or improve; rent or sublet; and benefit financially from the sale of crops.<sup>51</sup> While land rights for particular groups (such as indigenous people and women) have been established in the international legal framework,<sup>52</sup> strictly speaking, there is no broad human right to land under international law.<sup>53</sup>

However, access to land is widely accepted to be entwined with multiple human rights explicit in the international legal framework. As a source of livelihood, land access is integral to economic rights, such as the right to work. In the case of indigenous populations, land is linked to indigenous identities and thus land is tied to social and cultural rights. Land rights also serve as a basis for access to food, housing and development, water, and work—all fundamental human rights that are unambiguous in the international legal framework.<sup>54</sup> In both urban and rural areas, people rely on the availability of adequate tracts of land for shelter and for resources. Particularly in rural areas, the realization of the right to food is tied to the availability of land on which to grow crops.

More generally, human rights aspects of land affect a range of issues, including poverty reduction and development, peacebuilding, humanitarian assistance, disaster prevention and recovery, and urban and rural planning. People have been forcibly evicted and displaced from their land to make way for large-scale development or business projects such as dams, mines, oil and gas installations, or ports. A shift to large-scale farming has also led to forced evictions and displacements in a manner that may violate the human rights of the affected communities.<sup>55</sup>

Given that land rights are so closely entwined with multiple other human rights and overall stability, there are international legal implications of access to land for a broad range of human rights.<sup>56</sup>

### **A. Explicit Right to Land: Indigenous Populations**

The first area of international law in which explicit rights to land exist is with respect to the rights of indigenous populations. This is a clearly stated and unqualified right to land. For many indigenous populations, land is not only a means to economic livelihood, but a source of spiritual, cultural, and social identity. In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which gives indigenous peoples the right to the lands, territories, and resources that they have traditionally owned, occupied, or otherwise used or acquired. Article 8 of the Declaration states in paragraph 2(b):

“States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing them of their lands, territories or resources.”

Myanmar voted in favor of this Declaration<sup>57</sup> which, while not legally binding like a treaty, represents “the dynamic development of international legal norms and reflect[s] the commitment of states to move in certain directions, abiding by certain principles.”<sup>58</sup>

The right to land for indigenous populations is also addressed in the International Covenant on Civil and Political Rights (ICCPR); however, Myanmar is not a signatory to the covenant and thus is not bound by it.<sup>59</sup> Convention 169 on Indigenous and Tribal Peoples, adopted by the International Labour Organization (ILO) in 1989, is legally binding on States, but Myanmar has also not ratified this convention.<sup>60</sup> Ratification of both instruments would strengthen land rights of indigenous populations.

### **B. Non-Discrimination: Women’s Equal Right to Own Land**

The second area of international human rights law where rights to land are explicitly addressed is with respect to the rights of women. Women’s equal access to land and property is considered an important step towards eliminating gender discrimination and promoting equality.<sup>61</sup> Articles 14 (on rural women) and Article 16 (on the elimination of discrimination within the family) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), ratified by Myanmar on July 22, 1997,<sup>62</sup> address women’s equal right to land and participation in reform efforts.

Land rights may be accessed through three main institutions – the state, the market, and social structures such as family or community.<sup>63</sup> In the overwhelming majority of societies, women face unequal barriers in accessing and securing land rights, leading to unequal access to land and land tenure.<sup>64</sup> This lack of equal access to land and property consequently significantly limits women’s access to wealth, economic stability and independence.

Land tenure tends to reflect the distribution of power in society, and in most communities, men have more power than women. As such, women have weaker land rights that are rarely registered in law or that may be summarily revoked by men.<sup>65</sup> Moreover, government land allocation schemes often favor male heads of households, as do land administration systems in general.<sup>66</sup> Even if laws grant women equal rights in some respects and recognize certain customary laws that provide women equal rights in relation to land, as it is in Myanmar, the rights of many women are governed by customs that do not in fact give them equal access to or control over land. Myanmar has highly insecure land rights for women; this is mostly due

to cultural norms and practices that marginalize women within their households and marriages. Many women lack the knowledge that they have rights as joint owners of family land, or as a family member that may inherit land.

Violent conflict often has a disproportionate impact on women's right to and access to land. During war, the number of households headed by women increases dramatically, as men are recruited to fight or are displaced by conflict.<sup>67</sup> As a result women are left to support their families often unable to demonstrate a legally verifiable claim to land or property which is often the family's primary source of income. Women also face difficulties in accessing statutory dispute resolution mechanisms and an inability to access or effectively participate in humanitarian and recovery programs.<sup>68</sup>

In paragraph 2(g) Article 14, CEDAW states that, "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to "have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes."<sup>69</sup> Thus CEDAW requires equal treatment of women in all land reform efforts.

On the issue of land ownership within the family, in paragraph 1(h) of Article 16, CEDAW affirms that, "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."<sup>70</sup>

While land rights are not specifically referenced in Article 16, the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee"), charged with interpreting CEDAW, stated in General Recommendation No. 21 that Article 16(1)(h) requires the following:

"In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed."

In sum, CEDAW requires that States ensure women the right to equal treatment in land as well as in land resettlement schemes. CEDAW also states that both spouses must enjoy the same rights with respect to the ownership, acquisition, management, administration, enjoyment, and disposition of property, in marriage.

### **C. Fundamental Human Rights Related to Land**

Within the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), there are multiple articles that implicate the right to own land through the protection of corollary core human rights. Myanmar has signed but not ratified ICESCR and so it has an obligation to refrain, in good faith, from acts that would defeat its object and purpose.<sup>71</sup>

Economic, social, and cultural rights covered in the UDHR and ICESCR include the rights to food and housing—rights that are intimately connected to access to land. The rights to food and housing are also deeply intertwined with women’s equality and non-discrimination – the inability to demonstrate legally verifiable claims to land or property, or to access or effectively participate in humanitarian and recovery programs, interfere with women’s right to equal access to land and access to housing.<sup>72</sup> Without access to land, food security and general family well-being may also be at risk.

#### **i. Right to Food**

The right to food is clearly affirmed within the international human rights framework. Article 25 of the UDHR states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care . . . .” The right to food is made explicit in Article 11 of ICESCR.<sup>73</sup> Given that Myanmar has signed onto this covenant, it has an obligation to refrain from acts that defeat the purpose of the treaty. Therefore, Myanmar must not impede efforts to produce and distribute food.

#### **ii. Right to Housing**

The right to housing appears in several key international human rights treaties and is also laid out in Article 25 of the UDHR (quoted in the above section). Housing is seen as a fundamental right and land is often necessary to have to fulfill this right. It appears in the ICESCR,<sup>74</sup> the Convention on the Rights of the Child (CRC) in paragraph 3 of Article 27, and in the non-discrimination provisions in Article 14 of CEDAW (previously discussed in section B). Article 27, Paragraph 3 of the CRC states: “State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and

others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing, and housing.” Myanmar ratified the CRC on July 15, 1991.<sup>75</sup>



### **PART III: DOMESTIC FACTORS RELATED TO LAND CONFLICT**

There are several characteristics unique to Myanmar that must be incorporated into any attempt to undertake land reform and land restitution in the country. Although this Report cannot explore all the complexities of the country, the primary issues will be discussed in this Part.

Among these characteristics is a history of land seizures by the government but often implicating the private sector and foreign investment; armed conflict that has led to significant displacement; and significant variation in history, culture, and land disputes between regions.<sup>76</sup>

#### **1) SEIZURE OF LAND**

The parties responsible for land confiscation in recent years in Myanmar include the military, non-military government departments, companies, and local authorities 5.8%.<sup>77</sup> Confiscated land has been used for military projects, urban redevelopment and industrialization, and infrastructure and agriculture projects, as well as various other projects.<sup>78</sup> Of the amount confiscated, 80% has been farm land, 8% deep water land, 7% forest land, and 5% other types of land.<sup>79</sup> These figures, compiled by the Norwegian Refugee Council and the Mekong Region Land Governance groups, demonstrates the complex nature of land seizures in Myanmar.

##### **A. Land Seizure by the Government**

The government of Myanmar has engaged in land confiscation, both compensated and uncompensated. These “land grabs” have increased as the state continues to open its economy to foreign investors and pursues policies to increase industrial agricultural production. The central government has seized land from multiple regions across the country, but the majority of land seizure has occurred in the central Dry Zone and in ethnic minority areas rife with natural resources. The absence of reform in land tenure arrangements, coupled with flourishing foreign investment in land, agribusiness, and resources, has increased the potential for land expropriation.

##### **B. Involvement of the Business Sector and Foreign Investment**

As stated above, the agricultural and ecological diversity in Myanmar lends itself to several areas of land use. This makes Myanmar land an attractive investment. Many land concessions have been granted in the Upland areas along the Thai and Chinese borders; land dispossessions and loss of resource-use rights have been most prevalent there. Groups such

as the Mekong Region Land Governance believe that this trend stems partially from the fact that tenure in the uplands has been historically regulated by customary law, which is not formally recognized under the current legal regime.<sup>80</sup>

The central plains, valleys, and deltas, where most of the ethnic Bamar majority population live, are the heart of Myanmar's agriculture business. The Dry Zone of upper central Myanmar is supported through the growth of rice and other cash crops and most farming is done by small farmholders. The central government has historically been very present in the Ayeyarwaddy Delta, and thus frequently intervenes and shapes land distribution in the area. Until recently, smallholders in the Delta region were subject to prescribed quotas – if the farmers were unable to sell prescribed quotas to the local government, their land was confiscated. Much of the land procured by the government in this manner has been granted to agribusiness companies that invest in Myanmar.

## 2) DISPLACEMENT DUE TO ETHNIC CONFLICT

Displacement has largely been due to ongoing ethnic armed conflict in Myanmar. In some instances, natural resources have been a leading source of conflict. Since most natural resources are located in areas where ethnic military groups operate (including groups that have a technical ceasefire with government forces), they are a source of tension between regional non-state governments and the central government. Ethnic armed conflict has led to great amounts of displacement, with people unable to return to their lands for various reasons ranging from the existence of land mines to the inability to prove land claims.

## 3) REGIONAL COMPLEXITIES

There are significant differences—governmentally, culturally, ethnically, and socially—between the different regions in Myanmar, which complicate any attempt at land reform and land restitution. Myanmar is divided into fifteen subsections: seven regions (Ayeyawady, Bago, Magway, Mandalay, Sagaing, Taninthayi, and Yangon); seven states (Chin, Kachin, Kayah, Kayin, Mon, Rakhine, and Shan); and one union territory (Nay Pyi Taw).<sup>81</sup> See Figure 1. (In this Report, the term “regions” is used in the generic sense, and includes the regions, states, and territory in Myanmar).

**Kachin** has experienced continued instability and active conflict. Ongoing conflict creates new displacement and exacerbates past displacement. According to the Norwegian Refugee Council's March 2017 Report, *Restitution in Myanmar*, farmers attempting to return to land that they view as theirs have faced lawsuits from third parties. In addition, refugees and IDPs have been unable to return to their residential lands. According to some stakeholders, the Kachin wish to return to their customary lands; the majority would likely be unwilling to

accept monetary compensation. Therefore, the success of restitution is deeply connected to a peace agreement between the government and ethnic armed groups within Kachin.

**Rakhine**, like Kachin, suffers from ongoing conflict and lack of a peace agreement with the federal government. According to USAID's 2013 country profile of Burma, Rakhine has the highest proportion of landless households in western Burma. Increasing numbers of people have been displaced as Myanmar's military presence has grown in the area. Like Kachin, it seems unlikely that a restitution solution will be reached without also reaching a peace agreement.

**Mandalay**, which lies in Myanmar's Dry Zone, is part of the country's central heartland region. Most farmers in the areas are commercial farmers that grow cash crops, such as sesame and beans for export. Mandalay has suffered from land seizures by the government, allegedly for the development of infrastructure and industrial zones. Land seizure in Mandalay has apparently led to skyrocketing land prices. Furthermore, GRET has found households with lands that have been confiscated three times before by various levels of government, ranging from ministers to high-level military members. According to USAID's 2013 country profile of Burma, Mandalay has the highest proportion of landless households in central Burma. In the 1970s, the former Ministry of Industry seized over 35,000 acres of land. Officials have said that nearly 32,000 acres have since been returned to farmers.

Because of the significant variation between regions, some experts have suggested that a regional land restitution program is preferable to a national program.<sup>82</sup> At minimum, many suggest that any national program must account for and incorporate local variations in land use, disputing parties, power differentials and the needs of relevant communities.

### **A. Competing Political Entities**

In several of Myanmar's regions, there are armed ethnic groups and other groups at conflict with the government, vying for control of the land and governance. To help understand the scope of this struggle: the official Myanmar government recognized sixteen dialogue partners at discussion on the October 2015 ceasefire agreement (four parties still have to sign the agreement as of May 2017), most of which were armed ethnic groups with varying and shifting allegiances; there were at least six other potential non-state armed groups that were excluded from the talks.<sup>83</sup> Two of the primary armed ethnic groups are the Karen National Union (KNU) and the Kachin Independence Organization (KIO), both of which are central to the ongoing peace process negotiations.<sup>84</sup> Both groups have existed for decades—the KNU was formed one year *before* then-Burma received independence—and operate military units along with quasi-governmental branches.<sup>85</sup> Although the level of conflict between the central government and each of these armed groups has ebbed and flowed over the years, with a

decrease in violence following the ceasefire in 2015, the conflicts over who is legitimate government in these regions are ongoing.

Beyond these armed adversaries to the official government, there is also unclear delegation of power among the *official* government systems in many regions of Myanmar. State and regional governments are run by the partially-elected legislative *hluttaw*, a Chief Minister, and a cabinet.<sup>86</sup> Administrative divisions and accountability mechanisms are often unclear at the regional level, with multiple departments seemingly having overlapping jurisdiction.<sup>87</sup> For example, the military still controls one-fourth of the seats in the regions.<sup>88</sup> The lack of clarity concerning the power division of regional governments and ongoing influence of the military in these institutions further complicates the governance structures of the regions.

## **B. Varying Uses of Land Across Regions**

Due to this Report's focus on land restitution in Myanmar, a quick summary of how land is used in the country is helpful as context. This section is necessarily a generalization because of the complex and varying uses of land in the country, but can help inform the contours of the broader land restitution discussion.

There is significant variation of land use across the country. Much of the northern "uplands" traditionally have depended on shifting cultivation, or "swidden" agriculture. In recent years, some individuals farming this land have been driven into less viable land (such as steep hills) as population density has increased. Most of the land is harvested with staple crops (such as rice), though there have also been shifts in the types of crops planted in these areas, including some movement into planting opium (which can be more lucrative).<sup>89</sup> The central "dry zone" is generally considered the heartland agricultural area, used for commercial farming. Many farmers face seasonal unemployment, drought, and land degradation.<sup>90</sup> The southern Irrawaddy Delta region is the country's primary rice growing area.<sup>91</sup> Meanwhile, the land in Shan is often seized for mining and resource extraction.<sup>92</sup> Government-promoted large-scale monoculture plantations, often for rubber, are mostly in Mon, Kachin, and Shan.<sup>93</sup> The different way land is used in each of these regions raises different types of land disputes and implications for land reform and land restitution.

Because different populations in Myanmar use the land in varying ways, the corresponding land disputes also vary. Overall, about 67% of the population in Myanmar live in rural areas and depend on agriculture for their livelihood.<sup>94</sup> About 30–50% of the population in these rural areas is landless.<sup>95</sup> Just under half (49%) of the land area is forest area, and about 17% is arable.<sup>96</sup> Populations that depend on forest area have faced deforestation (the country lost about 19% of its forests from 1990 to 2010) and excessive logging, threatening traditional practices and sources of food.<sup>97</sup> Myanmar residents that rely on both forests and agriculture

have faced displacement and compromised soil and water based on dam building, oil and other natural resource extraction, mining, and large-scale agriculture projects.<sup>98</sup>

### **C. Regional Land Complexities**

In Myanmar, both formal and customary tenure, as discussed in Part I.2, exist. In fact, since 1850, the federal government has at different times statutorily recognized twelve different forms of formal land tenure: freehold land, grant land, agricultural land, garden land, grazing land, culturable land, fallow land and waste land, forest land, town land, village land, cantonment land and monastery land.<sup>99</sup>

These categories do not take into account the many forms that customary land tenure takes in the country, none of which currently receive formal recognition (though some did during the British colonial rule).<sup>100</sup> Customary tenure is most common in the uplands. Different ethnic groups practice distinctive customary tenure, but it is particularly common among the Karen (about 7% of Myanmar's population), who serve as a good example of the complexity of customary tenure. The Karen traditionally practice shifting cultivation. This practice entails clearing forests and then letting them regrow for about a decade before returning to cultivate them again, which means that land may appear to be unused for nearly a decade but the community is planning on returning to it once the cycle comes back around to that plot.<sup>101</sup> The Karen further delineate customary land into rotational, irrigated, orchard, communal, grazing, and sacred land.<sup>102</sup>

An important note to these delineations is that little land in Myanmar has ever been formally registered. In 2007, the Ministry of Agriculture and Irrigation reported, for example, that about one-third of agricultural households had inherited their land and 20% had purchased it—it was unclear how the rest (about half) had obtained possession of their land.<sup>103</sup> New federal laws from 2012 that attempt to address these gaps are discussed in Part IV. However, at the local level, a common thread has been that the *hluttaws* feel unable to solve land disputes because of a lack of formal land registration, often suggesting locals with complaints register their land or lodge complaints with the central government, rather than providing solutions themselves.<sup>104</sup> This comes despite the fact that land registration is supposed to occur at the local township level, overseen by officials from the General Administration Department.<sup>105</sup>

## **PART IV: RELEVANT DOMESTIC LEGAL FRAMEWORK**

The primary source of property rights in Myanmar is the 2008 Constitution<sup>106</sup> which sets forth individual rights to property, as well the government's obligation to protect property.

Following the onset of democratic reforms, the government also passed two key statutes governing land tenure – The Farmland Law 2012<sup>107</sup> and the Vacant, Fallow and Virgin Lands Management Law 2012.<sup>108</sup> There is apparently no official policy or legislation on internal displacement in Myanmar.<sup>109</sup> Rather, constitutional and legislative enactments address property rights more broadly. Overall, the land rights structure does not insulate many property owners in Myanmar from arbitrary land seizures.

### 1) Constitutional Property Rights

The 2008 Constitution requires that the government respect an individual’s right to private property, but simultaneously gives it wide discretion to limit the scope of, or avoid, this obligation under certain circumstances.<sup>110</sup> Pursuant to Article 37(a) of the Constitution, all land rights emanate from the sovereign—the state.<sup>111</sup> The provision explicitly states that the union “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere.”<sup>112</sup>

The first reference to individual property rights then appears in Article 37(c). That provision places an obligation on the government to afford property rights to occupants—“the union *shall* permit **citizens**<sup>113</sup> right of private property, right of inheritance . . . **in accord with the law.**”<sup>114</sup> This latter provision leaves the government free to set the scope of what constitutes the property rights it is obligated to permit. In an oft-cited report, the Asian Human Rights Commission has interpreted the legal regime set up by Article 37(a) and (c) as “enabling the state to take over any land on the pretext of embarking upon a project in the national interest.”<sup>115</sup>

The government’s substantive obligations regarding property rights in the 2008 Constitution are similarly phrased. Article 372, discussing the right to private property, states that, “the Union guarantees the right to **ownership**, the **use** of property and the right to **private invention and patent** in the conducting of *business if it is not contrary to the provisions of this Constitution and the existing laws.*”<sup>116</sup> Perhaps most importantly, the vesting of land “ownership” in the government under another constitutional provision, namely Article 37, presumably creates such “contrary law.” This in turn limits Article 372’s scope vis-à-vis land to “land-use” rather than ownership rights.

In addition, pursuant to Article 356, “[t]he Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired.”<sup>117</sup> This language raises several issues pertaining to land restitution. Most importantly, although only a few land laws are relied on in practice, many anachronistic land use statutes continue to exist in the books as good law. Some set conflicting standards of conduct specifically as to the question of legal acquisition.<sup>118</sup> In addition, over the previous decades, when the sale of land was made

explicitly illegal, large numbers of individuals sold and purchased land informally, in what is known as “10-Kyat contract.”<sup>119</sup> It is unclear whether constitutional protections apply to these lands, as they were not lawfully acquired. Also absent from mention are customary property regimes.<sup>120</sup> It is likewise uncertain whether these lands are constitutionally protected. This conclusion is strengthened by the fact that none of the land-governance statutes passed after the constitution’s adoption explicitly protect, or have been interpreted to protect, informal or customary land regimes.<sup>121</sup>

## **2) Legislative Protections**

In addition to the 2008 Constitution, the government passed two implementing statutes that pertain to land rights – The Farmland Law 2012<sup>122</sup> and The Vacant, Fallow and Virgin Lands Management Law 2012.<sup>123</sup> Neither statute specifically applies to the land restitution rights of IDPs. In several places, these statutes create potential challenges to future land restitution efforts.

### **A. The Farmland Law**

The 2012 Farmland Law creates several rights and protections that, in line with Article 37 of the Constitution, are framed as “use” rather than ownership rights. The most important of these rights are the right to sell, buy and lease one’s land.<sup>124</sup> The statute also protects the right to mortgage and inherit the land.<sup>125</sup> To these ends, the statute expressly repeals the Land Nationalization Act of 1953,<sup>126</sup> which directed all lands to become government property and made it illegal for farmers to transfer, exchange or lease their land. The Farmland Law also creates a comprehensive compensation mechanism should the government exercise its eminent domain power to seize the land for public use.<sup>127</sup>

However, the Farmland Law also creates several sources of confusion that could adversely impact future restitution efforts. Most significantly, the statute makes no mention of IDPs nor does it clearly apply to customary farming methods.<sup>128</sup> Similarly ambiguous is whether the Law’s compensation mechanism retroactively applies to land grabs that occurred prior to 2012.<sup>129</sup> Moreover, the statute overlaps with existing statutes that remain good law.<sup>130</sup> For example, chapter 8 of the Farmland Law lays out relatively comprehensive compensation guidelines, while, the 1894 Land Acquisition Act, still on the books, also sets out (a less comprehensive) compensation mechanism.<sup>131</sup>

### **B. The 2012 Vacant, Fallow and Virgin Lands Management Law (VFVL)**

The VFVL seeks to regulate and distribute unoccupied land towards more efficient purposes. In order to do so, the statute creates a “Central Committee” to administer all “vacant, fallow



and virgin lands.<sup>132</sup> Pursuant to Chapter III, Section 8, the Central Committee has discretion to permit or deny the right to use the virgin, fallow or vacant land.<sup>133</sup>

However, like the Farmland Law, the VFVL also creates potential hurdles for future land restitution efforts. First, unoccupied land is very broadly defined. The Act pertains to (a) “virgin” land, or “wild land and wild forest land . . . said expression shall include the lands of forest reserve, grazing ground and fishery”;<sup>134</sup> and (b) “vacant” land, or abandoned land that was formerly tilled or used for breeding.<sup>135</sup> Some scholars and commentators have suggested this definition of “virgin” and “fallow” land encompasses uplands, waterways, graze lands and lands on which farmers practice shifting cultivation; in other words, land managed under customary land tenure.<sup>136</sup> Some of these lands are also located in resource-rich areas that are of particular interest to foreign and domestic investors.<sup>137</sup> Therefore, it is possible that the VFVL could potentially further complicate Myanmar’s ongoing land disputes.

In addition, under the VFVL, land that goes unused for four years reverts to government ownership as vacant or fallow land.<sup>138</sup> This stands as a significant barrier to displaced persons who have been living in refugee camps for more than four years.

### **C. Previous Legislative Attempts at Addressing Land Restitution**

There have been limited attempts at addressing land restitution in Myanmar. The most prominent example of this is the Reinvestigation Committee for Confiscated Farmlands and Other Lands, created by the federal government in 2016.<sup>139</sup> Experts on land restitution see the Reinvestigation Committee as not adequately addressing the crisis of land tenure caused by land confiscation and displaced persons in the country.<sup>140</sup> The Reinvestigation Committee faced a backlog of thousands of cases, political pressure, and a narrow mandate—it considered cases of illegally confiscated land but did not address the land disputes facing displaced persons.<sup>141</sup>

## PART V: COMPARATIVE COUNTRY CASE STUDIES

### 1) INTRODUCTION

Various countries have faced similar challenges as Myanmar and, consequently, have implemented land restitution efforts. These comparative country case studies, along with the international and domestic legal context, can provide a framework for understanding what should be included in a potential land restitution and land reform efforts in Myanmar. For this part of the report, we surveyed the land restitution and land reform programs of various countries and identified five countries that contain socio-cultural elements relevant to Myanmar's context: post-conflict nations, some of which are also post-colonial, that have undergone land policy reform with similar conditions to Myanmar such as the presence of IDPs and multiple ethnic communities. For each case study—Bosnia and Herzegovina, East Timor, Indonesia, Iraq, Kosovo, and Zimbabwe—we used the Pinheiro Principles and international standards as guidance and have noted particular lessons learned that may be relevant to Myanmar. Uganda and Sri Lanka were in the original set of countries reviewed but were omitted after a determination that they ultimately did not offer significant lessons for Myanmar.

### 2) ASSESSMENT TOOLS FOR COMPARATIVE CASE STUDIES

#### A. The Pinheiro Principles

Spurred by the global spike in internal population displacement during and following the civil wars of the 1990's, the UN community began formulating coherent, unified global standards on restitution rights<sup>142</sup> for refugees and IDPs that embodies international human rights standards, as well as lessons learned.<sup>143</sup> The resulting *United Nations Principles on Housing and Restitution for Refugees and Displace Persons* (Pinheiro Principles) are relied on throughout this section as the standard against which to assess the performance of each country case study's restitution program.

The Pinheiro Principles were developed by the Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, Paulo Sergio Pinheiro, and approved by the UN Human Rights Sub-Committee in 2005.<sup>144</sup> The principles reflect both the international community's human rights standard vis-à-vis land restitution discussed above, as well as best practices learned from national and international efforts to address post-conflict displacement. Plainly stated, the principles are “designed to provide a universal approach to dealing effectively with outstanding housing and property restitution claims.”<sup>145</sup> Moreover, the Pinheiro Principles are drafted to apply to all those forced to leave their

property involuntarily, regardless of the particular form of displacement (Pinheiro Principle 1) and are therefore equally applicable to all IDPs.

Pinheiro Principle 2 defines and reaffirms the right of all displaced persons to housing and restitution adopted in earlier U.N decisions discussed above.<sup>146</sup> The document formulates restitution as the “right to have their land and/or home returned to them,” or alternatively, “be compensated in cases where restoration is factually impossible.”<sup>147</sup> Crucially, factual impossibility is to be determined by an independent and impartial tribunal<sup>148</sup> – the very kind of institution that often is lacking in post-conflict environments.

Sections 3-10 seek to ensure that the restitution program’s implementation are guided and informed by other crucial human rights. These include, among others, the right to non-discrimination, gender equality, peaceful enjoyment of possessions and freedom of movement.<sup>149</sup> The “right to return”, voluntarily, to one’s land is required by Section 10. Return must be voluntary, including for IDPs not coerced.

Sections 11-22 provide for very specific procedures and standards that states designing post-conflict land restitution programs should implement. These sections can in turn be used to construct a metric to assess the performance of a country’s land restitution program.

For the purposes of this study, the substantive provisions of the Pinheiro Principles (listed in short form in the following chart) have been synthesized into quantitative and qualitative factors that measure the performance of each studied country’s land redistribution and restoration program. These factors are considered throughout this section. For ease of reference, we provide a summary chart listing these factors, as well as each studied country’s performance vis-à-vis these factors. See Appendix: Summary Chart.<sup>150</sup>

## Pinheiro Principles

1. Scope and Application	2. The right to housing and property restitution	3. The right to non-discrimination	4. The right to equality between men and women
5. The right to be protected from displacement	6. The right to privacy and respect for the home	7. The right to peaceful enjoyment of possessions	8. The right to adequate housing
9. The right to freedom of movement	10. The right to voluntary return in safety and dignity	11. Compatibility with international human rights and related standards	12. National procedures, institutions and mechanisms
13. Accessibility of restitution claims procedures	14. Adequate consultation and participation in decision-making	15. Housing, land and property records and documentation	16. The rights of tenants and other non-owners
17. Secondary occupants	18. Legislative measures	19. Prohibition of arbitrary and discriminatory laws	20. Enforcement of restitution decisions and judgments
21. Compensation	22. Responsibility of the international community	23. Interpretation	

## **B. Alternative Principles: The Voluntary Guidelines**

The Food and Agriculture Organization has also published *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (“Voluntary Guidelines”).<sup>151</sup> The Voluntary Guidelines offer a separate set of guiding principles for land restitution and land reform, with significant detail added to flesh out its broad principles, including sections devoted to the legal recognition and allocation of tenure rights, transfers, and administration.<sup>152</sup> The Voluntary Guidelines are likely to prove informative for any country undergoing land restitution and land reform, including Myanmar, and are respected and followed by many members of civil society.

Researchers ultimately chose to frame the analysis in this Report using the Pinheiro Principles because they are the formal guidance from the UN and leading scholars<sup>153</sup> in the field of land restitution and land reform have relied on the Pinheiro Principles. Because the Voluntary Guidelines generally align with the Pinheiro Principles and do not provide conflicting guidance, both sources provide valid frameworks for analysis.

### **3) CASE STUDY 1: BOSNIA AND HERZEGOVINA**

#### **A. Background**

As with the other states that comprised the former Yugoslavia, Bosnia and Herzegovina’s (“BiH”) experience with land restitution and land reform has been complex, defined by ethnic conflict, political instability, and the move from a centrally-planned socialist economy to a market one.<sup>154</sup> Unlike most states of the former Yugoslavia, BiH is composed of three major ethnic groups (Bosniaks, Croats, and Serbs), none of whom represent a significant majority. This dynamic defined the state’s experience with independence and related land restitution and land reform.<sup>155</sup>

BiH was a part of the Ottoman Empire and then the Austro-Hungarian Monarchy until World War I. During the Ottoman era, property in BiH was largely organized through *timar* and *zaim*, feudal estates determined by military service.<sup>156</sup> This same system was kept by the Austro-Hungarian regime, which also instituted a dual land registration system that continues to this day. Under this system, local courts kept a land register and the municipalities ran the “cadastre.”<sup>157</sup> Between the world wars, BiH became a part of the Kingdom of Yugoslavia. During this time, land was redistributed from primarily wealthy Muslim landowners to poor Serbian peasants, dissolving the share tenancy systems.<sup>158</sup> The Nazis treated BiH as a spoil of war during World War II, displacing Jews and Muslims from land and awarding it to Slovene “colonists.”<sup>159</sup>

Following the war, BiH became a Socialist Republic within the Socialist Federal Republic of Yugoslavia. Significant amounts of agricultural and industrial land as well as commercial property, such as urban apartment buildings, were confiscated by the state during these years, and either distributed to peasants or kept in state ownership, with individuals granted occupancy rights.<sup>160</sup>

BiH declared independence from Yugoslavia in 1992, after a referendum that was boycotted by Serbs living in BiH. This declaration led to violent ethnic conflict that lasted for three years, at which point BiH was declared an independent country. Over a million residents were displaced during the conflict, and half of the state's housing units destroyed.<sup>161</sup> After the conflict ended, the international entity of the High Representative (OHR)<sup>162</sup> helped facilitate a peace, which had as one of its focuses property restitution and population return.<sup>163</sup>

The international community and the OHR continue to be invested in BiH to this day. The country still faces social turmoil and has been referred to as a “neo-feudal’ state in which power is concentrated locally, in mini-states, based on patronage, influence peddling, and mafia-like elites.”<sup>164</sup>

## **B. Property Rights and Claims**

There were several different groups with property rights and claims that had to be considered when BiH and the HR began peacebuilding efforts in 1995. The primary groups were composed of the following: individuals who had their property socialized under the Yugoslav regime; individuals who had abandoned their property during the 1990s conflict; and individuals who had been awarded abandoned property during the 1990s conflict.

*Individuals who had their property socialized under Yugoslavia* included members of all ethnic groups. The poor land recording system and the destruction of government property during the 1990s conflict made these claims particularly hard to prove.

*Individuals who had abandoned their property during the 1990s conflict* constituted over one million Bosnian citizens who had often left their homes suddenly and had been forced by armed combatants to sign papers signifying “abandonment” of their property.<sup>165</sup>

*Individuals who had been awarded abandoned property during the 1990s conflict* had generally been reallocated “abandoned” property by one of the warring ethnic groups during the conflict. The warring groups meant to consolidate ethnic control over areas through such allocations, though they provided the housing for allegedly “humanitarian reasons” to people who had fled other areas of the country.<sup>166</sup>

### C. Policy and Legal Responses

BiH and the HR adopted several policy responses in its efforts at land restitution and land reform after the 1990s conflict. A notable omission, though, is that the state did not address those who lost their property to socialization under Yugoslavia. These people were not eligible for compensation or restitution of any kind.<sup>167</sup> Overall, the system was created to return to the pre-conflict status quo. But not to create a durable, consistent property system.

The General Framework Agreement for Peace (GFAP), for the first time in such an international agreement, included the “right to return home,” and to be compensated if a home had been destroyed.<sup>168</sup> These rights were grounded in the international rights of refugees and IDPs to return. Because of the reallocation policies during the war, the parties also adopted the condition of reciprocity. Since all three ethnic factions had given “abandoned” property to displaced people of their own ethnicity, the post-war policy of property repossession allowed displaced individuals to remain in their wartime property until they were able to return to their pre-war property, or they had been compensated for it. This included property that was socially owned.<sup>169</sup> Driven by international pressure, the territories controlled by all three ethnic groups also ended the discriminatory policies and laws concerning abandoned properties with the “laws on cessation.”<sup>170</sup>

The international community supported robust international monitors, including the United Nation’s Property Law Implementation Plan (UN PLIP), which assisted in full implementation of these policies.<sup>171</sup> PLIP was led by the UN’s High Commissioner for Refugees, the Organization for Security and Cooperation in Europe, and the UN Mission in Bosnia Herzegovina, which worked together in an attempt to create a consistent approach towards political questions over property in BiH. These groups supported local groups in BiH to coordinate the property mandates of the overlapping agencies and primarily worked on ensuring that refugees returned home, that property policies were applied across BiH in a neutral manner, and that BiH began to adopt a consistent property law scheme.<sup>172</sup>

The OHR also set up a dispute resolution body under Annex 7 of the peace agreement, the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), which handled disputed property claims, for both residential and non-residential property. At first, the CRPC had no enforcement power, and was *ad hoc*, decentralized, and met with obstruction by local officials.<sup>173</sup> Its decisions were made final and binding, though, and it ended up processing 310,000 claims in a neutral manner that has been highly praised.<sup>174</sup>

The CRPC’s primary mandate was to make final decisions on the property rights and values. It was run by nine commissioners, three of whom were international and six of whom were national (two each of Serbs, Croats, and Bosniaks), and supported by the International

Organisation for Migration.<sup>175</sup> Staff included international and local lawyers, as well as other experts with property expertise. The staff was intentionally ethnically diverse. The CRPC set up six regional offices and eventually ran twenty-two claims collection facilities.

The CRPC was given broad powers in order to fulfill its mandate, including accessing all property records in BiH, sending staff to investigate and process claims, adopting its own procedural and substantive rules, and disregarding all illegal property transactions (particularly those made under duress). It rendered final decisions that took priority over any inconsistent decisions by other bodies (such as local courts) or documents (such as deeds).<sup>176</sup> The CRPC was able to award either possession or compensation (as discussed below, it generally awarded possession).<sup>177</sup> The process it set up allowed claimants to choose their preferred course for using their property. However, the CRPC was a purely administrative body and did not implement its own decisions, but rather the implementation was handled by other domestic agencies, which were often obstructionist, particularly at the start of the process until cooperation increased under international pressure.<sup>178</sup> By 1999, local courts generally respected the binding force of CRPC decisions when claimants had trouble repossessing their properties and the current inhabitants of property could be forcibly ejected if they did not follow court orders.<sup>179</sup> By 2004, 90% of displaced claimants had recovered binding rights on their pre-conflict properties, though not all had been able to repossess their properties (often due to the destruction of homes, security concerns, or difficulty traveling).<sup>180</sup> The success of the compensation side of the CRPC was never truly tested because of the preference for restoration, but the proposed Compensation Fund, intended to be funded by donors, did not materialize; the Fund was not self-sustaining and BiH was facing budgetary shortfalls, which likely means the compensation mechanism would have faced significant barriers if it had been employed.<sup>181</sup>

Complex special procedures were set up to deal with the possibility of fraudulent claims and the extra difficulties that came with working with displaced persons who were often poor and illiterate.<sup>182</sup> It also took three years for the CRPC staff to build a “cadastral database” which had “the most comprehensive and technologically advanced” database of property information in the region to facilitate solving property claims.<sup>183</sup>

Eventually, the CRPC was generally considered a success. As stated above, by 2004, it provided 90% of claimants displaced by the conflict binding rights on their pre-conflict properties. Over two million people were displaced, internally or abroad as refugees, by the conflict; by 1999, the CRPC had processed 200,000 claims and released 80,000 decisions and, by 2003, over one million displaced persons had returned to their pre-conflict homes.<sup>184</sup> The precise number of those who returned is difficult to determine because many people created lasting homes during the war and many displaced persons who returned home were also occupying abandoned properties in other regions during the war.<sup>185</sup> Those who occupied



abandoned properties during the war almost always had their interests subordinated to the pre-war occupants, although if they themselves had been displaced, they were eligible for emergency housing.<sup>186</sup> Because the CRPC was focused on the claims of those displaced by the 1990s conflict, its mandate did not encompass and did not assist those individuals displaced by the Yugoslav socialist regime.

#### **D. Lessons Learned**

The BiH post-conflict restitution approach has generally been praised as successful given its relatively narrow focus.<sup>187</sup> The primary flaw was that there was no restitution (restoration or compensation) for property owners whose land had been socialized under the Yugoslav regime. There were specific problems with the implementation as well. Military officials from the Yugoslav People's Army, for example, often had their property rights in socially owned apartments revoked if they failed to meet strict criteria under the federal "Apartments Law," since they were not considered refugees under that law. This law was eventually amended following criticism and decisions before the European Court of Human Rights and other legal bodies but the CRPC never required the government amend it. This was criticized as collective punishment for the aggressors.<sup>188</sup>

The BiH land restitution and land reform process was the first one in the former Yugoslavia and it helped provide a framework for future land efforts in the region. Its focus, which was followed in Kosovo (see Part V.7), was on returning property rights to the pre-war status quo. This included returning property to those who had lived there without proper title and allowing title disputes that existed pre-war to be solved by the courts at a later date.<sup>189</sup>

One important lesson from BiH is the necessity of incorporating regional historical practices into property schemes. In BiH, this meant understanding the role of socially owned property and occupancy rights as well as how to handle restitution for the secondary residents of property (those who took occupancy as displaced persons during the war). The process also showed the international community that property rights should be respected as their own right, not just as a means to accomplish the right to return home. Finally, the BiH experience showed the potential for local officials' obstruction and the need for a formal mechanism to handle disputes that could not be undermined by such officials.<sup>190</sup>

### **4) CASE STUDY 2: EAST TIMOR**

#### **A. Background**

East Timor's land tenure problems stem from its complicated political history. Since first being discovered by Portuguese explorers in the 1500s, it was first a Portuguese colony and

then later, an Indonesian province. In 1974, the Portuguese dictatorship ended and the process of decolonization began. East Timor unilaterally declared independence on the 28<sup>th</sup> of November, 1975.

That year Indonesia invaded East Timor and, over the next two decades, engaged in aggressive acts, killings and disappearances in East Timor. At the time, Indonesia occupied West Timor, and fearing that an independent East Timor would threaten Indonesia's security, decided to heavily support people willing to integrate with Indonesia. A civil war ensued between parties in favor of independence for East Timor and those in favor of integration with Indonesia. Indonesian troops invaded East Timor and declared it to be a province. However, the East Timorese were dissatisfied with Indonesian rule, and voted in a 1999 referendum in favor of independence. The Indonesian military was angered by the outcome of this vote and violently retaliated against the East Timorese.

East Timor was declared an independent nation in 2002, but the country was left with numerous challenges in the aftermath of the Indonesian military violence post-referendum. From 1999-2002, East Timor was administrated by the United Nations Transitional Administration in East Timor (UNTAET). UNTAET was established on 25 October 1999 to administer the territory, exercise legislative and executive authority during the transition period and support the building of self-government. East Timor gained its independence as a country on 20 May 2002. Many of the country's land records were destroyed in the period of violence preceding UNTAET's administration; the Indonesian military had purposely torched buildings and land titles. It is estimated that eighty percent of Indonesian land records in East Timor were destroyed.<sup>191</sup> Given that East Timor was first a Portuguese territory and then an Indonesian one, this alone would have created a number of conflicting land title issues. However, in addition, the violence of the Indonesian military resulted in a country with housing shortages and considerable difficulty in ascertaining ownership of land.

East Timor is therefore both a post-conflict and a post-colonial environment.<sup>192</sup> As such, it faces post-conflict issues such as the return of refugees, inadequate shelter, restoration of land records, and restoration of institutions of governance.<sup>193</sup> In terms of post-colonial issues, East Timor has had to implement a new government, build new infrastructure, employ a method with which to resolve land conflicts and develop a land tenure system that can address the injustices of colonial and invasion rule.<sup>194</sup>

## **B. Property Rights and Claims**

Post-referendum, East Timor saw an abundance of land claims based on claims from various times throughout the country's history. There are four categories of potential claimants of land in East Timor. Claimants can be customary owners of the land, individuals who acquired

land under Portuguese title, individuals who acquired land under Indonesian title, and individuals in current possession of the land.<sup>195</sup>

*Traditional occupiers of land* include those who hold customary rights to land. Given that customary land is not recognized in the legal system, most land in the rural areas of East Timor is not recognized in any formal system; the land is distributed in accordance with traditional institutions and is normally held in community-based groups.

*Individuals who acquired land under Portuguese rule* include the people who acquired title to land during East Timor's time as a Portuguese colony. The claims made by these people have involved titles for very valuable land, and concerns were raised that recognizing these claims would result in a small colonial elite holding some large and valuable parcels of land in East Timor.<sup>196</sup> Recognition of these titles was found to be justified under the law of "belligerent occupation" which would conclude that since Indonesia was a belligerent occupier, Portuguese law remained, in effect, the underlying law of East Timor during the period of Indonesia's occupation.<sup>197</sup> Thus, since the land titles issued under Portuguese rule should have been recognized during Indonesia's occupation, they should still be recognized today.

*Individuals who acquired land under Indonesian rule* were overwhelmingly wealthy Indonesian families and corporations. Few East Timorese acquired these titles. Some suggested that the belligerent occupation rule applied and so invalidated the recognition of any Indonesian titles. However, others argued that the East Timorese who did acquire land under Indonesian rule did so in good faith. In addition, finding the titles acquired under Indonesian rule invalid would have likely conflicted with international standards relating to housing security and protection against unreasonable evictions.<sup>198</sup> Finally, it was not clear that the Constitution terminated past rights of non-nationals or that, even if it did, it terminated land use rights rather than simply ownership rights.

*Individuals who are currently occupying land* were the final group of land claimants. Due to political unrest over the past 40 years, there are high levels of displaced groups in East Timor. Many properties are occupied by people who are not recorded owners. Moreover, at issue were not only claims by original owners of land, but also claims of people who entered into land contracts with people who were not the rightful owners of the land.<sup>199</sup>

### **C. Policy and Legal Responses**

To resolve these various arguably legitimate competing claims, a mediation model for addressing conflicts over land was introduced in East Timor by the UN Transitional Administration in 2000.<sup>200</sup> Mediation takes place both through this formal structure and

through ad hoc channels. East Timor's National Directorate of Land and Property helps with mediation, but the mediation itself can follow many paths. The system involves interim no-violence agreements that may be sealed by ritual and witnessed by traditional, government, and church representatives. A benefit of this program is that it embeds the mediation system in land administration rather than judicial administration which allows for remedies to be reached that are unavailable to the courts, such as selling, leasing, dividing, or swapping land.<sup>201</sup> It also creates a bridge between traditional dispute-resolution mechanisms and the courts; this is advantageous because when parties agree, they may use ritual and customary institutions, and when they are unable to agree, they may resort to the court system.<sup>202</sup> However, mediation will not occur if the land subject to dispute is the property of the state or if one of the parties is an officer of government.<sup>203</sup>

The mediation process is as follows:<sup>204</sup>

1. A claimant goes to the National Land and Property Directorate or the District Land and Property Directorate office and requests mediation. A dispute may also be referred to the directorate by a village head if the parties agree to this.
2. The other parties to the dispute are informed of the claim. Mediation proceeds only when all the parties to the dispute voluntarily accept the mediation.
3. The parties to the dispute agree to a Land and Property Directorate mediator.
4. A directorate mediator visits the disputed land and gathers information about the history of ownership from local informants.
5. The directorate mediator invites the claimant and current occupant to separate meetings to hear each side of the dispute. Evidence may be presented that includes public and private documents, witnesses, and physical proof.
6. The directorate mediator then meets with the claimant and the current occupant together in order to try and find a solution that is acceptable to both parties.
7. During these meetings, the directorate mediator may facilitate interim agreements relating to land use and commitments not to engage in violence during pending resolution of the conflict. The mediator may also suggest possible solutions to the conflict, such as dividing, selling, leasing, or swapping the land.
8. The matter will be resolved if a solution agreeable to both parties is reached. If the parties fail to reach an agreement after three joint meetings, the dispute is referred to the courts.
9. If a settlement is reached, a report is produced and signed by both parties and the directorate mediator. The settlement is then registered with the Land and Property Directorate.

Mediation of land conflicts by the Land and Property Directorate has been more successful than resolution through the courts. In particular, East Timorese prefer to resolve disputes at

the local and customary level and this system allows them to do this. Using local mechanisms for dispute resolution is cheaper, faster, and more accessible. Between May 2002 to June 2007, out of 747 disputes brought to the Land and Property Directorate, 240 were marked as resolved.

In 2009, the Minister of Justice produced the “Draft Law on the Special Regime for Attributing Property Rights” but it has not yet been approved by the government. It was vetoed by the president in 2012 because traditional tenure was insufficiently protected and the law made no explicit recognition of customary forms of tenure. As of 2002, East Timor did not have a functioning land registry, an effective regime to govern and legalize foreign interests in land or a framework to determine competing claims to land.<sup>205</sup>

#### **D. Lessons Learned**

Several lessons can be derived from East Timor’s post-conflict land situation. First, where there is destruction of property, records, housing, and infrastructure, it is imperative that interim measures be taken to ameliorate land administration problems caused by the process of refugee return. One such measure is to divert returnees (refugees and IDPs), particularly those that lack housing of their own, to temporary transit housing centers.<sup>206</sup> This results in a minimization of rushing to occupy habitable homes and aids in the long-term process of re-establishing land administration. This kind of interim land administration helps to manage the process of return and reconstruction without the necessity of final determination of underlying ownership, which requires more time, building, and infrastructure. Second, the establishment of a land claims commission in East Timor was postponed and interim solutions provided some mechanism to regulate private transactions of land.<sup>207</sup> In addition, *de facto* situations start to consolidate more and more with time. As it becomes more difficult to return land already filled with current occupants.

The development of a system that enhances certainty in post-conflict land administration without necessarily resolving the underlying issue of land ownership can be successful if it is focused on transactions rather than title.<sup>208</sup> Such a system can provide incentives for those taking private interests in land to register their transactions and it includes the potential for this registration to provide more certainty of title as time goes on.

### **5) CASE STUDY 3: INDONESIA**

#### **A. Background**

Before its independence in 1945, Indonesia was always under some form of colonial rule. Its land situation is informed by this; the land laws that evolved were a mixture of western

systems (to satisfy the interests of the colonial governments) and the traditional unwritten laws based on customary rights to land which existed in Indonesian cultural groups.<sup>209</sup> Indonesia sought to end this dualism in land law through the passage of the Basic Agrarian Law.

## **B. Property Rights and Claims**

An increased focus on rapid economic development in Indonesia from the 1960s to the 1990s left certain segments of the population neglected; in particular, rural landlessness is a significant problem, especially on Java.<sup>210</sup> Generally, land rights of unregistered land owners are insecure, which greatly affects traditional communities. Many traditional communities live in forest areas with land owned through customary tenure; Indonesia's significant deforestation comes with an increasing high cost to traditional communities who rely on the forests for their livelihood. Since their land rights are not formally recorded, they historically have been unrecognized by the state. Uncertainties over policy and regulatory practices, as well as overlapping land-use and property rights in general, have created frictions between the central and local governments and between businesses (mostly the mining and palm oil sectors) and local communities.<sup>211</sup>

Indonesia's 1999 Forestry Law effectively allowed the government to convert customary forests into state forests and, once under state jurisdiction, these forests could be converted into private concessions. Thirty percent of Indonesia's lands had been given to private companies as concessions, and many of these territories overlapped with indigenous lands.<sup>212</sup>

*Most land claims in Indonesia* come from a desire from indigenous peoples to assert or strengthen their land rights over forest lands.

## **C. Policy and Legal Responses**

Indonesia's land rights are primarily governed by the Basic Agrarian Law, Law No. 5 of 1960 (the "BAL"). This land policy pertains to 30% of Indonesia's land; the other 70% was classified as state forest land under the Basic Forestry Act of 1967.<sup>213</sup> This 70% of Indonesian land is not subject to agrarian law and makes the state and its forestry institutions the single largest landlord in the country. Declaring 70% of Indonesia as forest land and state-owned resulted in dispossession and a multitude of land grabbing by the military, enterprises, and state institutions.<sup>214</sup> The BAL defines the fundamental types of rights that may be held by private individuals and entities and it describes the role of the state with regard to its regulation of private rights and private uses of land.<sup>215</sup> It states that Indonesia's agrarian law is Indonesian customary law as long as it does not conflict with other regulations or national interests.

There are currently five types of basic tenure, with the highest and closest to freehold tenure called Hak Milik, this tenure is the same as ownership. Hak Guna Usaha is cultivation only; Hak Guna Bangunan is building only; Hak Pakai is use only; and Hak Pengenolaan is land management only.<sup>216</sup>

Customary land law (*adat*) governs Indonesia's traditional communal land tenure system. Article 5 of the BAL states that Indonesia's agrarian law is *adat* law, but it also considers these customary laws to be incompatible with economic development and expects *adat* to gradually adapt to national law or be replaced by it.<sup>217</sup> The government has been hostile for a few decades to the continued existence of communal tenure.<sup>218</sup>

The institutional land governance framework appears to be decentralized. Given that there are inefficiencies across agencies with large overlap in mandate, the administration of governance and application of policies have been inconsistent and discretion abused.<sup>219</sup> In 1999, the formerly centralized system was decentralized and large powers were given to the regional governments. There is currently a mix that resembles a top down system with regards to development, with regional governments making plans but the central government having the authority to override locally-made plans.<sup>220</sup>

Indonesia commenced a Land Administration Project (LAP I) in 1994. The project aimed to accelerate land titling and registration by systematically mapping and registering rights for land for parcels in all non-forest areas; to strengthen the National Land Agency as an institution so that it can achieve the objectives of the program; and to support the government of Indonesia's efforts to come up with a long term policy for land management through a series of studies.<sup>221</sup> The Land Management and Policy Development Project (LMPDP) was intended to follow LAP I but focus more on institutional development.

There are multiple land rights issues that must be addressed in legislation going forward. The existence of both formal and customary law leads to ambiguity in interpretation and often leads to the undermining of land rights and increased disputes and conflict over land. The land registration system that Indonesia does have is overly complex, creating inefficiencies that weaken security of tenure and the development of a functioning land market.<sup>222</sup> Another problem is that a focus on economic development has led to deforestation that significantly threatens Indonesia's forest resources, to the point of impacting global climate change. Finally, rural landlessness has led to livelihood and food insecurities for millions of families.

There has been an increasing focus on protection of community rights and that of indigenous persons. In March of 2017, the World Bank approved a \$6.25 million grant to help Indonesia's

indigenous and local communities secure land rights, manage forests, and improve their livelihoods. Given that forestry is an important source of income for many of Indonesia's rural communities, the grant will help address deforestation and strengthening of indigenous peoples' rights. President Joko Widodo announced in 2017 that Indonesia would return 13,000 hectares of customary lands to nine indigenous communities and committed to returning 12.7 million hectares to local and indigenous groups.<sup>223</sup> Indonesia's decision to return customary lands to indigenous peoples was considered a landmark achievement.

#### **D. Lessons Learned**

Indonesia provides important lessons for land disputes that stem from the government's taking of customary lands. In the case of Indonesia, an overly cumbersome land registration system may not be an improvement on lack of registration altogether. The financial burdens associated with registering land in Indonesia served as a barrier to doing so. In addition, the complex system lead to ambiguities and a lack of clear rights and procedures for registering communal rights. Since customary practices differ across communities in separate districts, this central registration system is unproductive. A better administration solution would involve working with districts to understand processes for identifying, describing, and registering customary land rights of traditional communities. Districts would also be able to develop local guidelines for implementing more transparent procedures.

One more lesson is that legislation that resolves ambiguities between customary and formal land laws may be necessary to effective land restitution. If legislation can clarify the differences between the two and provide a mechanism for translating one into the other, this might reduce confusion and conflict between the co-existing customary and formal systems.

### **6) CASE STUDY 4: IRAQ**

#### **A. Background**

Iraq is composed of three primary ethnic groups—Shia Arabs (the majority), Sunni Arabs, and Iraqi Kurds—as well as a number of smaller minority groups, such as the Christian Yazidis, Assyrians, and Turkmen. The Shia majority and Kurds were “viciously suppressed” for much of the latter half of the twentieth century, under the Ba'ath regime.<sup>224</sup> The 2005 Constitution recognizes the autonomy of the Kurdish region, Kurdistan, in northern Iraq.<sup>225</sup>

Iraq was a part of the Ottoman Empire until World War I, after which it came under British control. During the Ottoman era, property was classified under the quasi-feudal TAPU system which issued title deeds and ran a land registry. Individual property rights were recognized.<sup>226</sup> In 1932, Iraq gained independence and became the Kingdom of Iraq, under the



control of a Hashemite monarch. This king was overthrown in 1958, and the Republic of Iraq took place of the Kingdom. Two successive coups in 1963 overthrew the government and the Ba'ath Party (which had been behind the first of the 1963 coups) attempted another coup in 1968, through which it succeeded in taking control of the government. There were some reforms to land ownership during this time, but the Ba'ath government largely inherited the TAPU system.<sup>227</sup>

Iraq was controlled by the Ba'ath regime from 1968 to 2003, with Saddam Hussein at the helm from 1979 until his overthrow during the 2003 invasion of Iraq by the United States-led coalition. Hussein led a secular Sunni Arab government that oppressed the Shia majority and other ethnic minority groups. Individual and new group rights for property were recognized during the Ba'athist regime; communal ownership was encouraged during the early socialist years; and the TAPU system was replaced with the Real Estate Registration Law.<sup>228</sup> This Law improved the issuance of titles and created Real Estate Registration Departments throughout the country. This system continues today and most land is registered under it (about 96%).<sup>229</sup>

During the Ba'athist regime, many non-Sunni Iraqis were denied their property rights for ethnic, religious, and political reasons.<sup>230</sup> The government frequently engaged in forced displacement and property expropriation or destruction policies to consolidate its power.<sup>231</sup> These policies targeted political enemies as well as Shia Arabs and ethnic/religious minorities (Assyrians, Turkmen, and Yazidis). Several specific policies undertaken by the regime were "Arabisation policies" that displaced non-Arabs in the north (e.g. Kirkuk) with Sunni Arabs from the south; the Al-Anfal campaign and other politically motivated punishment for opposition to the regime (specifically Kurds); the expulsion of "disloyal" Shias of Iranian origin during the 1980s; and the "crony capitalism" policies that allowed Ba'athist allies to take land they desired.<sup>232</sup> These policies displaced about one million Iraqis.<sup>233</sup>

After the 2003 invasion, the United States-led coalition retained a significant presence in Iraq over the next decade. The Coalition Provisional Authority (CPA) ran Iraq under military occupation immediately following the occupation but it quickly ceded some power to the Iraq Interim Governing Council and then to the Iraqi Interim Government, a caretaker government. Elections in 2005 (the first in fifty years and boycotted by Sunni Arabs) led to a transitional government and then a series of uneasy, elected governments. Many Sunni Arabs who had been moved to northern Iraq during the "Arabisation" policies were forcibly ejected from their residences following the 2003 invasion.<sup>234</sup> "Bogus" titles to land increased during this time of instability.<sup>235</sup>

Though there have been some periods of relative stability, Iraq has continued to face serious political instability, violence, regional turmoil, and terrorism, leading to significant civilian

deaths since the 2003 overthrow of Hussein.<sup>236</sup> Al-Qaeda and, more recently, ISIS insurgents have posed a serious threat. ISIS has retained control of major Iraqi areas, including Fallujah and Mosul, since 2014, leading to airstrikes by the US and other foreign powers and the resignation of the government. Since the 2003 invasion, “land and property rights violations have persisted and periodically increased due to the mass displacement and political turmoil between 2006 and 2008 and again in early 2014.”<sup>237</sup> About four million additional Iraqis were displaced from 2003 to 2008.<sup>238</sup>

## **B. Property Rights and Claims**

There were several potential claimants of disputed land that were relevant to the land restitution and land reform efforts post-2003. The most relevant groups included individuals who had lost their property to discriminatory Ba’athist policies; individuals whose property had been destroyed during the Ba’athist regime; and individuals who were driven from their homes after the 2003 invasion.

*Individuals who had lost their property to discriminatory Ba’athist policies* included those who were targeted by the Arabisation policies in the north and the crony capitalism supported by the Ba’athist regime. This group mainly comprised Shia Arabs and ethnic/religious minority groups.

*Individuals whose property had been destroyed during the Ba’athist regime*, due to the Al-Anfal or other campaigns, were often similar to those targeted by discriminatory policies. For example, farmers had their property taken under discriminatory policies and the property on these farms destroyed. Many of the victims of property destruction were ethnic minorities.

*Individuals who were driven from their homes after the 2003 invasion* were often the Sunni Arabs who had been moved to the northern regions under the Arabisation policies. Many were poor and did not have anywhere to go after they were driven from the property after Hussein and the Ba’athist regime fell.

## **C. Policy and Legal Responses**

Property disputes were a serious concern following the 2003 invasion. Especially in strategic areas such as Kirkuk and Kurdistan, there was a real concern that conflicting property claims would lead to increased instability across the country. Because most properties from which people had been displaced were at that point occupied by poor residents with nowhere else to go, the government faced a dilemma over how to address these disputes.<sup>239</sup> While specific policies have changed, since 2003, the Iraqi government has encouraged refugees and

internally displaced persons to return to their homes, with public awareness campaigns and grants to aid resettlement.<sup>240</sup>

To address conflicting and longstanding property claims in Iraq in 2003, the Iraqi government, at that point led by the coalition under the CPA, created the independent, quasi-judicial Commission for the Resolution of Real Property Disputes (CRRPD).<sup>241</sup> The CRRPD was later renamed the Property Claims Commission (PCC). When the Iraqi interim government took over from the CPA, the commission generally kept the same mandate but with some changed policy approaches. Both the CRRPD and the PCC were at all times staffed entirely by Iraqi nationals, with international involvement mostly limited to the International Organization for Migration (IOM) providing technical assistance.<sup>242</sup>

The primary goal of the commission was to process, collect, and adjudicate property disputes stemming from the acts of the Ba'athist regime. The Iraqi government in control after the CPA ceded power strongly felt that those who had lost property rights under the Ba'aths deserved restitution.<sup>243</sup> As such, the commission only had jurisdiction over claims from between 1968 and 2003.<sup>244</sup> The commission had mandates over “(1) confiscation or seizure of property for political, religious or ethnic reasons or in relation to ethnic, sectarian or nationalistic displacement; (2) appropriation or seizure of property without consideration, with manifest injustice or in violation of the applicable legal rules; and (3) state property allocated to the members of the previous regime without consideration.”<sup>245</sup> These categories demonstrate that the group for which systematic redress was possible was those whose property had been forcibly taken by the Ba'aths and *not* those whose property was destroyed or who lost non-real estate property. Individuals who had long-standing leases that were not formally registered (a common practice) and farmers without formal documentation generally received no help from the commission.<sup>246</sup>

The PCC set up thirty decentralized branches and thirty-five judicial committees to process and adjudicate property claims.<sup>247</sup> The commissions allowed for both compensation and property restoration mechanisms. Victims had the right to property restoration where the property was in the hands of the government, a high-ranking Ba'ath member, or a person who had taken “advantage” of the victim; otherwise, the victim could request restoration or compensation. If granted restoration where the secondary occupant had bought the property in good faith, the secondary occupant could apply for compensation.<sup>248</sup> Experts testified at hearings on the valuation of property, based on value at the time of the claim. The party that first sold the property after the victim lost it (generally the government) had to pay this compensation, though government payment was slow and hesitant.<sup>249</sup> All parties had the right to appeal.

With the help of the IOM, the commission set up a web-based property claims system and an online database of property records.<sup>250</sup> The IOM also assisted the PCC with training, information dissemination, awareness, and out-of-country claims (needed due to the number of Iraqi citizens who fled Iraq during and after the Ba'athist regime).<sup>251</sup> By 2005, about 500,000 displaced persons had returned to their homes; by 2009, the PCC had received about 150,000 claims; about 67,000 had been decided while compensation had been paid in only 1,000.<sup>252</sup>

Land restitution and land reform efforts have also been shaped by regional variation, especially in areas like Kurdistan where multiple governments vie for power and, therefore, have not been stable across Iraq. Land registration and dispute resolution is complicated in Kurdistan by the ongoing struggle between the central government and the Kurdistan Regional Government which officially share power over the territories.<sup>253</sup> The unstable region of Kirkuk has also proved a challenge and faced difficult problems with property dispute resolution. The IOM, as well as the United Nations Assistance Mission for Iraq (UNAMI), have continued to provide assistance with “local dialogue and negotiations” to address these disputes.<sup>254</sup> Additionally, the government has not proved amenable to the policy of robust restitution. Instead, the Ministry of Finance regularly appeals any decision from the CRRPD that requires the government to financially compensate a victim or to relinquish government-owned property.<sup>255</sup>

The PCC did not have jurisdiction to address the property disputes arising from post-2003 displacement. People facing property disputes from post-2003 displacement often have to rely on the local courts for assistance. This is in part because this crisis is ongoing and the government does not have the capacity to address property resolution at the moment.<sup>256</sup> However, the government did set up limited administrative help under the Council of Ministers Decree 262 and Order 101 to specifically address recovery for people displaced during 2006 and 2007 who met strict criteria (e.g. they were displaced to a neighboring country for less than eight months).<sup>257</sup> Multiple agencies with unclear roles and few resources were assigned to these claims and there was no dedicated body or oversight.<sup>258</sup> Claimants could submit claims at two return centers and go through the process, which was complicated and required significant documentation.<sup>259</sup>

This process was not well known; only 500 or so applicants went through the centers (with about half succeeding in their claims) while 10,000 registered to receive a grant to help with resettlement (few received it).<sup>260</sup> Secondary occupants of these homes, since they did not receive official state approval as they did during the Ba'ath regime, were subject to criminal sanctions.<sup>261</sup>

#### **D. Lessons Learned**

There are several lessons that can be gleaned from Iraq's uneven experience with land restitution and land reform. First, it is hard to properly assess the success of the PCC and the CRRPD: the ongoing, high levels of violence and displacement in the country never allowed the commissions to be truly tested. This suggests that, in any country where conflict and violence is ongoing, expectations for what land restitution and land reform systems can accomplish must be correspondingly lowered.

Second, Iraq's differing regions complicated efforts around land restitution. There were some attempts to address regional differences in Kirkuk and the Kurdistan regions, for example, but no systemic attempts to make the federal policy nuanced enough so as to incorporate all the relevant regional, ethnic and historical differences. More deliberate attempts to do so would likely have increased the success of the program and perhaps even have helped with broader reconciliation efforts, as groups that have been historically marginalized would have seen their concerns validated.

The specific policies followed in Iraq, while not fully tested, generally provide guidance on how *not* to set up a land restitution system. The commissions have been criticized for the "isolated" approach that they took to property resolution; for failing to integrate in a cohesive manner with other country policies; and for failing to integrate many vulnerable groups into the property dispute resolution process: these trends suggest that, even were the context less volatile, the CRRPD would not have been able to significantly improve reconciliation and peace efforts in Iraq.<sup>262</sup>

The setup of the Iraqi land dispute resolution system also shows how substantive flaws might be created by procedural flaws; in Iraq's case, shown through its hurried, isolated, and non-inclusive approach to setting up the system. The PCC and the CRRPD were pragmatic approaches to property disputes largely driven by the anti-Ba'ath politicians that took power following the 2003 invasion. This created two major problems with the system. First, the property dispute resolution mechanisms were created with a sense of urgency that made them isolated, rather than integrated into the broader attempt at transitional justice.<sup>263</sup> There was little effort to consider how to use the property dispute mechanism as a way to heal the country and prepare it for democratic governance. Instead, the second problem arose, the approach was non-inclusive and focused just on the targets of the Ba'ath regime.<sup>264</sup> The administrative process addressing 2007–08 claimants has primarily been criticized for applying to an overly narrow subsection of potential claimants, and for poor administrative coherency.<sup>265</sup>

The Iraqi experience also demonstrates why administrative processes that minimize government involvement will often be preferable in land dispute resolution processes to judicial and quasi-judicial mechanisms. As mentioned above, the decision of the Ministry of Finance to appeal almost all adverse decisions and the right to appeal for all parties, led to an enormous backlog in decisions and a lack of certainty over ownership.<sup>266</sup> In addition, the decision to use a judicial, rather than an administrative process, similarly led to slow resolution of cases and was seen as the incorrect type of system given the huge number of cases to decide.<sup>267</sup>

## **7) CASE STUDY 5: KOSOVO**

### **A. Background**

As with BiH and the other former Yugoslavian states, Kosovo's complex experience with land restitution and land reform has been marked by ethnic conflict, political instability, and the move from a centrally-planned socialist economy to a market one.<sup>268</sup> Since gaining independence in 2008 and officially ending its period of international oversight in 2012, it has shown significant development of laws protecting property rights but successful implementation of these laws has proven more elusive.<sup>269</sup>

A former part of the Ottoman Empire, Kosovo was split between the Kingdoms of Serbia and Montenegro following the First Balkan War in 1912–13, both of which eventually joined the Kingdom of Yugoslavia following World War I. In 1937, a survey of Kosovar land was completed under the Turkish *tapi* system, which occurred without surveying measurements, using a piecemeal system marred by population movements driven by conflict.<sup>270</sup> Albanians in Kosovo—the majority population but marginalized, often illiterate, and hesitant to pay steep *tapi* taxes—were essentially excluded from this process and their property was listed as government owned.<sup>271</sup> The *tapi* system formally provided only possessory, not ownership rights, to land. This system remains at the “core” of land registration in Kosovo, although “informal land transactions” are most commonly used.<sup>272</sup>

Temporarily a part of Albania during World War II, Kosovo became a part of the Socialist Federal Republic of Yugoslavia following the war. Kosovo was recognized as the Autonomous Province of Kosovo and Metohija, a part of the Socialist Republic of Serbia. The majority of land remained in private use throughout the socialist era, but the state did take control (without compensation) of significant amounts of agricultural land known as socially owned enterprises (SOEs) and of urban land (“construction land”).<sup>273</sup> The right to private land ownership was formally recognized in Kosovo by Yugoslavian law in 1989.<sup>274</sup>

Kosovo began pushing for increased independence as soon as 1981. This resulted in a backlash in which the Serbian-controlled government removed Kosovo's autonomous governing authority by 1990.<sup>275</sup> The following ten years are known as the "discriminatory period" for the discriminatory policies faced by the non-Serbian Kosovars, particularly Albanians. Discriminatory housing laws, such as legislation that canceled property sales by Serbs to Albanians, drove many Albanians from their homes.

A war for Kosovo's independence, within the context of the Yugoslav Wars, began in 1998. This war, the population displacement it caused, and the destruction of government buildings housing land registration documents destroyed many existing land titles.<sup>276</sup> An intervention by NATO allowed Kosovo to reclaim its autonomy in 1999. Prior to 1999, Kosovo had no effective institutions for recording or defining land rights.<sup>277</sup>

The United Nations Mission in Kosovo (UNMIK) administered Kosovo until 2008 when Kosovo formally declared independence. Serbia still does not recognize its independence.<sup>278</sup> UNMIK did not alter the right to private land ownership granted to Kosovo by Yugoslavia.<sup>279</sup> It did set up the Housing and Property Directorate and the Housing and Property Claims Commission to deal with controversy over land claims.<sup>280</sup> UNMIK also established the Kosovo Trust Agency (KTA) to privatize the 12% of Kosovar land comprising SOEs.<sup>281</sup> The Privatization Agency of Kosovo (PAK) replaced the KTA in 2008. Since 1999, UNMIK, Kosovo, and other actors have worked to create a workable system of land rights in Kosovo.

## **B. Property Rights and Claims**

There were several different groups with property rights and claims that had to be considered when Kosovo began land restitution and land reform after the 1998 war. These include the following: individuals who had owned property before socialization; individuals who lost property due to the discriminatory policies of the 1990s; individuals who fled from property during the war in 1998; individuals living in illegally built property; and minority populations, particularly Serbs.

*Individuals who owned property before socialization* were of all ethnicities. These rights were largely supported by the flawed *tapi* records, discussed above, which left many Albanians with no formal rights over their ancestral property. Many of these land records had been destroyed during the war.

*Individuals who lost property due to the discriminatory policies of the 1990s* were mainly Albanians. During this period, the central Serbian government revoked Kosovar autonomy and implemented policies that discriminated against non-Serbs in the province.

*Individuals who fled from property during the war in 1998* were of all ethnicities and had often left their houses and apartments on short notice. In the months following the end of the war, many of these properties had been occupied by new residents without the permission or knowledge of the prior residents.

*Individuals living in illegally built property* were primarily Kosovo Roma, Ashkaeli, and Egyptian communities. Many had lived in property for decades under informal terms. These properties were systematically destroyed during and after the war.<sup>282</sup>

A final group that merited special attention during the Kosovar land restitution and land reform was *minority populations*, particularly Serbs. Although Serbia controlled Kosovo until 1999, Serbs were a minority within Kosovo, who complained of discrimination at the hands of the local government.

### **C. Policy and Legal Responses**

The primary land reform approach applied in Kosovo was to privatize land through the sale of SOEs.<sup>283</sup> The KTA and its successor, the PAK, adopted the position that the prior ownership status of socialized land did not need to be determined.<sup>284</sup> As such, this land is still being privatized and auctioned on an ongoing basis, generally in large parcels. While several other former Yugoslav states adopted a similar policy, many paired it with restoration of land where possible, compensation, or distribution of land, none of which Kosovo chose to pursue.<sup>285</sup> Kosovo's chosen policy has precluded the option of future physical restoration for land that was seized by the socialist Yugoslav regime.<sup>286</sup>

The other primary policy was to return residential properties to their pre-war owners who had been displaced by the war or who had lost property due to the discriminatory housing policies of the 1990s (primarily Albanians).<sup>287</sup> UNMIK set up a two-bodied mass claims mechanism under the Housing and Property Directorate (which ran the administrative body of the claims mechanism) and the Housing and Property Claims Commission (which was a quasi-judicial commission). These were later transformed into the Kosovo Property Agency (KPA) and the Kosovo Property Claims Commission with the same mandates. The judicial bodies were set up to complement the administrative bodies because the Kosovar judiciary was still fledgling and was not prepared to adjudicate the claims.<sup>288</sup>

The Directorate (later KPA) had a number of roles in post-conflict Kosovo. It both provided guidance about the "overall direction" of Kosovar property rights and conducted an inventory of abandoned housing and aided in renting that housing.<sup>289</sup> However, its primary role was resolving property disputes. Residential property claims were divided into three categories: claims by persons whose occupancy rights were revoked after March 23, 1989, based on



discriminatory legislation (these were primarily Albanians targeted by the discriminatory housing legislation of the 1990s) (Category A); claims by persons who voluntarily entered into informal transactions of residential property after March 23, 1989 (Category B); and persons who owned, possessed, or had occupancy rights to residential property prior to March 24, 1999 but no longer had possession of the property and had not voluntarily transferred it (generally, refugees and IDPs) (Category C).<sup>290</sup>

The Directorate considered claims made by individuals who had lost their residences. Claimants did not need to prove causation (for example, that the conflict had directly caused them to leave their homes), which removed a potential barrier to claimants' success. The Directorate had the exclusive jurisdiction over claims under any of these categories. Its decisions were final, enforceable, and not subject to review by another body (though it could review its own decisions).<sup>291</sup> Claims were only considered if submitted by a set deadline but that deadline was extended three times (until the final date of July 31, 2003).<sup>292</sup>

Ultimately, the claim resolutions bodies succeeded in adjudicating 99.7% of the approximately 27,000 property claims before it, though far from all of these led to repossession of property, often due to security concerns and limited cooperation between agencies.<sup>293</sup> Category C claimants (displaced persons) lodged about 93% of claims.<sup>294</sup> Restoration was the preferred outcome by the Directorate (though many individuals preferred to sell their houses once they obtained possession of them) and the Directorate rarely provided monetary compensation. The primary subset of cases where compensation was allowed was where there were competing occupancy claims. Compensation was allowed when a Category A individual was granted restoration of a residence that a Category C individual had purchased after the discriminatory policy had removed the property from the Category A individual. The Category C claimant, or secondary occupant, was then entitled to compensation for the purchase price paid.<sup>295</sup>

Since the Directorate was facing a crisis with over a hundred thousand destroyed homes and few functional land records, it was given a conservative, narrow jurisdiction that was deemed manageable.<sup>296</sup> Specifically, agricultural land and other non-residential property were excluded from the restitution process; no compensation was available for most lost properties. Many criticized this approach as not adequately providing a comprehensive property dispute resolution scheme.

Also, some noted that victims of discriminatory policies were given preference over those who had lost property as the result of the war.<sup>297</sup> This was because, at the time the Directorate's mandate was drafted, the huge number of displaced persons (generally Serbs) was not yet recognized and Albanians who had been victims of discriminatory policies had been understood to be the primary victims of the conflict.<sup>298</sup>

In 2006, the KPA replaced the Directorate. Its jurisdiction was expanded to include the ability to resolve disputes over agricultural and commercial property.<sup>299</sup> Claims were accepted until December 3, 2007, and any claims filed after that date are heard before general civil courts.

#### **D. Lessons Learned**

Several of the basic lessons learned from the Kosovo land restitution and land reform process mirror those first learned in Bosnia and Herzegovina (BiH). Those are addressed in the BiH section and not repeated here (see Part V.3).

The land restitution and land reform project in Kosovo has generally not been seen as a success. USAID refers to Kosovo as having “poorly defined and enforced property rights,” particularly for women and minority communities.<sup>300</sup> It is characterized by the “absence of an effective property rights regime.”<sup>301</sup> This is in large part due to the fact that the rotating entities responsible for the state did not work to create a uniform property system, but instead left in place systems from various regimes that conflict with each other and added reforms without integrating them with the existing system (or explicitly abrogating the old system).<sup>302</sup> As in BiH, the focus of the post-conflict land restitution and land reform was to return to the pre-conflict status quo, not to remake the system.

Specific flaws from the post-war land policies are also apparent. For one, the setup of the Directorate unintentionally had a disparate impact on the Kosovo Serb population. It underestimated the number of displaced peoples in this population (about 100,000) and failed to adequately compensate them. Over 17,000 Kosovo Serbs ended up launching claims against UNMIK and other entities. The United Nations put aside most of these claims and few were ever tried.<sup>303</sup>

Unlike in BiH, the Directorate also provided restitution for only residential, not commercial or agricultural, property (as it based the restitution on the principle of the “right to return home”).<sup>304</sup> This negatively affected minority communities and the ability of many Kosovars to return to their pre-war economic activities, often agricultural.<sup>305</sup>

The Directorate also provided no support for the Roma and other minority communities who had their longstanding, but informally owned, properties destroyed.<sup>306</sup> This came in spite of international human rights protections, specifically from the UN Committee on Economic, Social and Cultural Rights, for groups living in informal property schemes.<sup>307</sup> The Roma and other minorities were essentially denied the right to return to their homes.

Limited cooperation between the Directorate/KPA and the “return” agencies (which helped displaced persons return to their homes) limited the success of property resolutions, showing that increased agency cooperation would have helped the success of the complaint resolution mechanism.

Finally, the split in jurisdiction between the Directorate/KPA and regular courts created some confusion. It was not always easy to determine whether property claims fell under one of the categories over which the Directorate/KPA had a mandate. For example, where a claim fell under Category C but the original purchase was flawed, it would fall to a local court, not the Directorate/KPA, to determine the validity of that claim. These rulings often conflicted with the Directorate/KPA findings and left parties with no final resolution.<sup>308</sup>

## **8) CASE STUDY 6: ZIMBABWE**

### **A. Background**

European colonists began to enter Zimbabwe in the 1850s, upsetting local community rule and property systems. The country, now known as Zimbabwe, was declared Rhodesia in 1890, and the country faced significant land grabs by the colonists who drove the African populations into reservations (now called communal lands).<sup>309</sup> Land was given to “white” settlers and soldiers and taken from Africans without compensation. This became official under the Land Apportionment Act of 1930 and the Land Tenure Act of 1969.<sup>310</sup>

Demands for independence began around 1960 and was marked by armed rebellion and sporadic battles until the country gained independence from the United Kingdom in 1980.<sup>311</sup> Zimbabwe’s land restitution and land reform efforts date back to this time, which marked the end of white minority rule, and were formalized in the 1980 Lancaster House Agreement. The challenge faced by the incoming government was enormous. As one might expect, Rhodesian white farmers had seized the vast majority of arable and fertile land. Indeed, approximately 6,000 large-scale white farmers owned nearly all arable, fertile land in the country.<sup>312</sup> The government’s reform efforts sought, at least ostensibly, to redistribute land in a more equitable manner and improve the lot of landless black farmers. Throughout the years, Zimbabwe’s government failed repeatedly to carry out a uniform, preplanned process, but rather, continuously revised (sometimes drastically and with little respect for human rights) its policies in response to social, economic and political pressures. For this reason, it makes sense to divide Zimbabwe’s reform process into discrete phases, each of which is summarized below.

## **B. Property Rights and Claims**

There were several different groups with property rights and claims that had to be considered when Zimbabwe began to reform its land ownership and system following independence. The groups involved in this process were primarily white landowners from the colonial period and native black Africans.

*White landowners*, as discussed above, had been given land by the colonial government prior to 1980, and had possession of a majority of the land in the country.

*Native black Africans* had been dispossessed of much of their land during the colonial period, under formal and informal mechanisms. Many of these individuals were farmers or low-wage workers. At the time of independence, many were living on reservations and did not have their own property.

## **C. Policy and Legal Responses**

*Phase I – Consensual Land Sales:* Following the Lancaster House Agreement, the new government promised not to force white farmers off their lands for a period of 10 years.<sup>313</sup> The government therefore adopted a policy where it would buy land from willing white farmers and redistribute the land to black peasants.<sup>314</sup> Ultimately, some 3 million hectares were purchased and redistributed; far short of the government's 8 million hectares goal.<sup>315</sup> Among the main reasons for the slow progress was the government's diversion of funds for other purposes.<sup>316</sup> Another important reason is that the government's increased demand for large-scale land dramatically increased prices, resulting in holdouts by white farmers. The government determined that a more coercive mechanism was needed.

*Phase II – Coercive Acquisitions:* Starting in 1990, the government, no longer constrained by the Lancaster Agreement, began implementing more coercive measures. To this end, the government amended the constitution to permit compulsory land purchases. It also passed the Zimbabwean Land Acquisition Act of 1992.<sup>317</sup> The bill empowered the government to coercively purchase land it deemed unproductive, but only in exchange for compensation. While the law did not require the government to pay full market value, it did give landowners some latitude to negotiate prices with the government; it also amended the constitution to enable land redistribution.<sup>318</sup> It is also noteworthy that international donors supported this phase of land redistribution reform. Britain, for example, provided land assistance grants to facilitate redistribution and compensation.<sup>319</sup>

But undermining the government's legal efforts were a faltering economy and political cronyism. Indeed, by the late 1990's, only around 1 million hectares were purchased and

redistributed.<sup>320</sup> As of 1999, 4,500 farmers—most of them white—owned over 11 million hectares of all the country's land.<sup>321</sup> The causes were twofold. First, rather than distributing much of the purchased land to landless black farmers, the government gave the lands to ZANU-PF party loyalists—who were otherwise inexperienced with farming techniques.<sup>322</sup> These tracts were then rented for profit to the very people who were supposed to benefit from the program.

Another contributing factor to the program's dubious track record was Zimbabwe's continuous economic decline. Throughout this period, Zimbabwe's large-scale farmers continued to produce much of the country's food supply and exports. Given the government's reliance on these farmers' output, many large-scale farms were left undisturbed.<sup>323</sup> However, Zimbabwe's dire economic prospects also had other, countervailing impacts. Perhaps most importantly, the ongoing economic calamity sharply increased political pressure on Mugabe to hasten the redistribution process by any means necessary.

*Phase III – Land Grabs:* Responding to mounting popular pressure to hasten the reform process, the government first attempted to pass by referendum a constitutional amendment empowering the state to seize white farmland without compensation in 2000.<sup>324</sup> When the amendment was defeated in a referendum, the government proceeded to (materially) support forceful seizures of farmland by army veterans and landless peasants. To lend a measure of legal legitimacy to the land grabs, the government passed the Rural Land Occupiers Act of 2001.<sup>325</sup> The act essentially shielded occupiers from legal sanction or eviction.

In the meanwhile, the government launched what became known as the Fast Track Land Reform Program. The new redistribution program essentially codified the constitutional amendment that voters rejected in a referendum. The program had several salient features. First, it designated some 3,000 farms for compulsory acquisition, although in practice far more farms were seized.<sup>326</sup> Rather than passing new legislation, the government simply deleted many due process procedures from the 1992 law, calling the amended version the Land Acquisition Act of 2000.<sup>327</sup> Perhaps most importantly, the amended version empowered the government to seize land without compensation, aside from "improvements" made to the land.<sup>328</sup> In addition, the 1992 law was amended to require only seven days' notice before the government could forcibly seize the farm.<sup>329</sup> In an effort to minimize court challenges, the bill was further amended to free the government from the obligation to personally serve the farmer with notice before seizing the farm. In practice, evictions were carried out, without even semblance of due process by paramilitary forces of army veterans linked to ZANU-PF.

Once "acquired," the land would be re-plotted. Some was to be plotted into large-scale farms, for which the government would earmark resources to invest in commercial agriculture. The remainder was to be re-plotted into small-scale farms, to be occupied by landless peasants.<sup>330</sup>

The process was beset by administrative difficulties and continuing violence. Indeed, much of the acquisition was accompanied with violent assaults on the original landowners. Moreover, given the government's dwindling revenues, the newly resettled farmers received little to no government training or financial support.<sup>331</sup> As a result, the country's once impressive food production plummeted, further increasing food insecurity and violence. As was common in previous redistribution efforts, much of the land was not redistributed based on need, but rather, on the basis of party loyalty.

Ultimately, some 8.3 million hectares were seized and 127,000 blacks farmers were resettled a part of the Fast Track Land Reform Program.<sup>332</sup> Some studies suggest that most of the land was distributed to landless black farmers and low-wage laborers in towns.<sup>333</sup> Still, as can be expected, ZANU-PF loyalists and army veterans have received a disproportionate share of the land.<sup>334</sup> Moreover, given the chaotic, violent nature of the redistribution program, few provisions were made for ousted black farmers who formerly lived on the land.<sup>335</sup> They were often ousted, along with their employers, without even a veneer of due process or compensation.

#### **D. Lessons Learned**

Relevant lessons can be learned from each phase of Zimbabwe's land restitution and land reform process. Zimbabwe's largely unsuccessful "Consensual Land Purchase" policy imparts two lessons that may be pertinent to Myanmar, should its government opt to purchase and redistribute land to IDPs. First, it is important to set modest goals. Some experts suggest that it was never likely that Zimbabwe's government could purchase so much land given its relatively modest resources—a problem which Myanmar's government shares as well. Second, and perhaps most importantly, Zimbabwe's effort illustrates that a purely consensual land restitution and land reform policy is likely unfeasible. That much is almost assured by the forces of supply and demand—as demand for land goes up, so do prices. The prospect of higher land values also makes holdouts more likely, necessitating some coercive measures.

Ultimately, the relative inefficiency of a purely consensual land restitution and land reform regime, coupled with fledgling legal institutions, in turn makes grassroots violence a particularly likely outcome. It might therefore be better to combine a consensual regime with some coercive elements.

Zimbabwe's failure to achieve its redistribution objectives illustrates the importance of maintaining accountability and transparency in the redistribution process. Of course, the Fast-Track Redistribution program generated numerous additional impacts, beyond the

scope of this memo. However, it can be said with confidence that, to the extent that Myanmar contemplates a similarly ambitious land-reform process, Zimbabwe's flagrant human rights and rule of law violations serve as a cautionary tale. As aforementioned, Zimbabwe's longwinded reform process further illustrates the importance of maintaining transparency in the reform process, as well as the need to combine some coercive elements into an otherwise consensual land purchase/redistribution regime. Finally, in light of the challenges that accompany an undertaking as tremendous and complex as a land restitution and land reform program, it is important to set expectations modestly, particularly in a country where the rule of law remains weak.

## PART VI: OVERALL LESSONS LEARNED

The case studies above illustrate successes, challenges, failures, and innovations in land restitution and land reform mechanisms. As illustrated in the Appendix, which subjects each case study to a compliance analysis with the Pinheiro Principles (discussed in detail in Part V.2.A), the case studies reveal broader insights that raise useful inquiries and considerations for Myanmar and other countries that are considering pursuing land reform or land restitution.

*1) DEFINE THE SCOPE: Properly defining the scope and providing a clear timeline for land restitution efforts facilitates effective implementation. In particular, it is important to determine at the outset whether the goal is to address immediate disputes or take on the underlying, more complex legal and policy issues.*

Each country faces a gateway decision concerning the scope and ambition of its land restitution and land reform undertaking. In BiH and Kosovo, the goal was specifically to return those recently displaced to the status quo.<sup>336</sup> In Zimbabwe, the process proved impossible to implement in an effective and peaceful manner because it was expansive, ambitious and resource heavy.<sup>337</sup>

The case studies demonstrate that focusing on the immediate conflict can help limit the number of implicated disputes and make the resolution process easier. However, where underlying reform is needed and not addressed, a narrow approach to dispute resolution may not fix necessary underlying issues. This is illustrated by the “neo-feudal”<sup>338</sup> character of BiH today and the ongoing chaotic land situation in East Timor.<sup>339</sup> In both situations, the land dispute resolution focused on relatively narrow subsets of the overall land scheme in the country. Even though the land dispute resolutions in both countries were seen as successful,

they did little to address these overarching issues facing land rights in the country, which continue to this day.

This decision depends in part on the type of crisis and/or displacement the policy is meant to address. Zimbabwe was addressing the legacy of colonialism on land ownership (Part V.8) while Kosovo narrowly wanted to rectify displacement resulting from the 1990s conflict (Part V.7). The scope and nature of the corresponding land restitution and land reform efforts reflected those underlying drivers. In Myanmar, individuals with land disputes have been displaced in many different ways: some are IDPs and refugees displaced by conflict; others have faced land seizures so that land can be used by the government or companies (for more on the specific challenges facing land conflicts in Myanmar, see Part III). At the same time, fundamental reforms foreseen in the National Land Use Policy regarding clarification of customary land rights, are yet to be realized. This makes it particularly important for the scope and intentions of any land reform or land restitution program adopted in Myanmar to be very clear about whose claims and which underlying issues it is trying to address.

*2) FLEXIBILITY AND EVOLUTION: Approaches that are flexible and change as needs evolve tend to be more impactful.*

The most successful processes in ongoing- and post-conflict environments appear to be flexible, tailored to local conditions and often rely on non-formal legal institutions. When creating land restitution and land reform policies, countries generally have to consider how to best adapt the mechanisms of these policies to their particular context and the strength of the legal sector. Some key facets are noting whether a chosen policy, as in Zimbabwe (Part V.8), is failing to adequately address the motivating policy concern and stopping or modifying that policy to prevent further damage. Taking into account the *purpose* of the land restitution is critical; in BiH, policymakers realized that land restitution had to include farm land in order to truly return people to the status quo and their former livelihoods, a consideration not fully appreciated in Kosovo (Parts V.3 and V.7). The East Timor example (Part V.7) also shows how local, community institutions can be incorporated into a formal government policy to improve its efficiency.



Related to tailoring the solution to the country's context, countries have to decide whether to structure their land restitution and land reform process in a way that is final or that is ongoing and adaptive to changes. While a finalized system with clear deadlines provides people with clarity and certainty, the land restitution and land reform process in Zimbabwe (largely unsuccessful as a model), demonstrates some of the reasons governments need to reflect on what has been a success and what has not when undertaking land reform and land restitution.<sup>340</sup> Interim and short-term policies can allow flexibility for the government to adjust policies that turn out to be less successful than anticipated.

***3) DETERMINE FORMALITY OF MECHANISMS: Administrative, judicial, or informal approaches or some combination of the three should be used as appropriate to the particular context.***

There are three primary types of processes for restitution mechanisms: administrative, judicial (or quasi-judicial), and informal processes. A process can also incorporate aspects from several of these categories. There are advantages and disadvantages to each of these mechanisms and one may be more appropriate than the other depending on the context. Like Myanmar, East Timor and Iraq had significant number of refugees and IDPs. The experience of these countries demonstrates that, when dealing with a high number of claimants, a judicial or quasi-judicial process is sometimes inefficient. For example, in Iraq the judicial process led the government to hear too many cases, which created a bottleneck and ongoing confusion over land rights.<sup>341</sup> Meanwhile, the informal mediation process used in East Timor, which included local community mediation outside of official state processes, resulted in high rates of successful resolution of claims and respect for traditional land rights.<sup>342</sup>

***4) INCORPORATE TRADITIONAL LAND RIGHTS: Traditional land rights should be accounted for in restitution mechanisms.***

According to some estimates, approximately 57% of the land that has recently been confiscated in Myanmar was customary land.<sup>343</sup> In such cases there is a need for land restitution and land reform programs to address the role that customary tenure has in the country, and the ability of actors to take advantage of the weaker formal legal protections for this land.

In two country studies, East Timor and BiH, incorporation of traditional land rights led to successful mechanisms.<sup>344</sup> East Timor did so through its local mediation mechanism and BiH by recognizing the rights of residents of socially-owned land. Though it may be more administratively difficult to extend land restitution to land whose ownership cannot be proven through official land records, the experience in these countries shows that a comprehensive policy requires this inclusion. Failure to do so would exclude numerous landowners with traditional claims to land.

**5) CONSIDER USE OF CUSTOMARY INSTITUTIONS: *Traditional, local, and/or customary institutions can provide useful for a implementation of a restitution mechanism.***

Similarly, traditional or customary institutions can sometimes be more resilient in conflict than state institutions.<sup>345</sup> This is seen through the greater degree of success experienced by the ad hoc mediation system in East Timor, based on local customs concerning land rights, than the formal administrative system created by the government. Post-conflict environments are often characterized by collapsed or weakened state structures. Therefore, customary institutions (where they exist) can be a first point of entry for addressing land disputes and it is useful to provide these traditional institutions with targeted support as more formal legal institutions become functional.<sup>346</sup>

However, various considerations should be at the forefront when considering the use of customary institutions. For example, while incorporating customary practices demonstrates respect for indigenous peoples and their connection to land that they might not formally own, any land reform or land restitution policy must not re-entrench traditional power dynamics by not scrutinizing inequalities latent in customary practices. Section 13 discusses the importance of assessing whether a land tenure system, whether customary or statutory, has inadvertent human rights effects on minority or women populations.

**6) ADOPT LOCAL, REGIONAL AND FEDERAL APPROACH: *Local, regional and federal strategies should be incorporated into a land restitution policy to ensure proper coordination.***

Part III of this Report explored the regional nature of land use and land disputes in Myanmar, implicating varying types of customary tenure, armed conflict, parallel governing

parties, and displacement of populations. Countries like Indonesia and Iraq have faced similar challenges with extreme regional differences. Experts on land restitution in Myanmar are divided about the implications of this regional variation: some think regional approaches must be attempted, while others believe a federal policy poses the best chance for success despite regional variation.<sup>347</sup> The solution to this question is not an easy or clear one—just as it is not in countries like Indonesia and Iraq, which faced similar difficulties of implementing federal policies in semi-autonomous regions—but any attempt at land reform or land restitution in Myanmar must account for these regional differences, whether that is done by creating regional approaches or a federal program with the flexibility to respond to the different stakeholders and land disputes throughout the country.

*7) CONSIDER A STAGGERED APPROACH: Where stability of the country and capacity of government is not reliable, a mechanism that upscales in stages may be preferable.*

Myanmar, like many countries that undergo land restitution and land reform processes, such as Iraq and Zimbabwe, is still facing significant internal challenges. The experience from Iraq shows that, when conflict is ongoing, expectations should be tempered and attempts at land reform and land restitution shaped with the actual capacity of the government in mind. Facing similar contexts, some countries have favored a staggered approach where the initial steps are, as seen in East Timor,<sup>348</sup> interim or stop-gap measures that stem the land crisis before a more broad-reaching policy can be applied once the country has stabilized.

Each of the countries profiled also demonstrates the importance of a minimum set of reliable institutions being in place before land restitution can take place, which relates closely to the additional challenges that arise when a country attempts to undertake land restitution or land reform while conflict is ongoing. Specifically, weak, partisan, or underfunded agencies put in charge of land restitution in countries from Iraq and Zimbabwe to BiH and Kosovo at times compromised the potential success of land restitution (Part V, Sections 3, 6, 7, and 8). The limited attempts so far at confiscated farmland restitution (not of IDPs) that have occurred in Myanmar through the Investigation and Reinvestigation Committees demonstrate that this will likely be a challenge in the country, as agencies have faced high volumes of complaints and many failed to lead to “adequate redress.”<sup>349</sup> These countries’ experiences show that robust judiciaries or separate, well-funded, and independent administrative adjudicative groups are essential to successful attempts at land restitution.

8) *ACCOUNT FOR LONG-TERM INSTITUTION BUILDING: Long-term institution building should be a component of mechanism to ensure sustainability and effective transitions .*

Restitution efforts run the risk of being short-sighted in that the immediate concern is resolving already existing land disputes. However, resolution of existing disputes should be made with an eye towards establishing or at least transitioning to a more stable system that will allow for effective resolution of future disputes.<sup>350</sup>

The United Nations Interagency Framework Team for Preventative Action, which is run by the UN Development Program, recommends an institutional approach as “the only sustainable approach to systematically addressing land-related conflicts.”<sup>351</sup> Strong and coordinated institutions can help ensure that land grievances are addressed, that land disputes are regulated, and that land conflicts can be avoided. This helps the post-conflict period to result in a sustainable peace. Important institutions in this context include the national government, local governments, the judiciary, land administration institutions (both statutory and customary), and traditional/religious leaders. Reliable mechanisms for dispute resolution, generally independent from these institutions, must also be set up and coordinated with these other institutions. Dispute resolution mechanisms are necessary to ensure that these state organs can together work to successfully make, implement and enforce rules.

9) *POTENTIAL FOR INTERIM PROTECTIONS: Weigh the advantages and disadvantages of interim and transitional protections which may provide immediate relief.*

Myanmar, as with most of the countries surveyed, also faces concerns over the additional problems created by land dispute resolution. Secondary occupants, for example, generally have few resources to move to new locations. One policy that addressed this issue was in BiH, where secondary residents were promised reciprocity and not required to relinquish their current housing until their previous housing, from which they had been displaced, was made available.<sup>352</sup> Lesser protections for secondary residents and interim protections for those newly displaced were undertaken in East Timor, among other countries.<sup>353</sup>

*10) LAND RESTORATION OR COMPENSATION: Redress should be tailored to community needs and circumstances of the recipient and take into account relevant factors such as use of land and access to financial institutions .*

Any land restitution policy has to decide whether to offer land compensation or restoration, or both. This is a complicated choice informed by both practical and political considerations. The country case studies presented demonstrate that land restoration has, in practice, generally been the preferred type of land restitution mechanism. The governments in BiH and Iraq,<sup>354</sup> for example, did not have enough funds to start a robust compensation program, a reality likely facing Myanmar as well. Political concerns were also raised in BiH and Kosovo, among others, that compensation would lead to, in essence, an official approval and concreting of forced displacement and ethnic segregation. These on-the-ground outcomes track the guidance from literature such as the Pinheiro Principles and the Voluntary Guidelines that suggest restoration is generally preferred to compensation (as discussed in Part II.2).

Many experts on land restitution in Myanmar similarly believe that restoration is likely the preferred form of restitution: people rely on specific types of land for their livelihood—return to just any land is not necessarily sufficient—and many also hold deep communal, ancestral, and cultural connections to the specific land from which they were dispossessed.<sup>355</sup> As discussed in Part III.4 of the Report, there are also concerns that many in Myanmar may not have the sophistication to properly invest compensation for land and such compensation will not succeed in putting that population into a comparable situation to where they were before their displacement.

Still, there are countervailing considerations in Myanmar context, as in any country, brought up by experts interviewed for this study. In some circumstances land restoration is a significant challenge because of ongoing conflict and secondary occupants; sometimes the land was seized for a company or government project that is ongoing; some land has been promised to three, four, or even five parties over time that all believe they are the legitimate owner of the land.<sup>356</sup> In addition, many refugees and IDPs, particularly from Karen state, have been displaced for over twenty years. After living in urban camps for decades—and, for younger people, not knowing anything else—many displaced persons may not wish to return to rural environments.<sup>357</sup>

### **11) CONSIDER IMPLICATIONS OF DEFINITIONAL CHOICES : Making deliberate choices about legal definitions .**

The definitional choices made about land dispute resolution, even those that appear relatively minor, can have significant consequences. Country case studies provide insight into clauses that may end up having significant effects.

- **Burden of proof.** In Kosovo, for example, claimants did not have to prove causation (e.g. that they lost their property *as a result* of the conflict) when putting in claims for loss of property.<sup>358</sup> This made the process more claimant-friendly and less administratively burdensome. Decisions about what burden of proof will be required to demonstrate ownership or other claim to land will be critical.
- **Eligibility of Property.** Another choice is what types of property are eligible for the resolution process, a choice highlighted in the Pinheiro Principles. While both residential and non-residential property was eligible in BiH, for example, Kosovo generally only provided resolutions for residential property.<sup>359</sup> This is a particularly important decision when many claimants (e.g. farmers) might rely on non-residential land for their livelihood, as in Kosovo and Myanmar.

### **12) RESOLVING EXISTING CONFLICT OF LAND LAWS AND POLICIES: Review and survey of existing land laws and policies should identify inconsistent, unclear, or conflicting laws and either remedy them or identify which take priority.**

Given the complicated domestic legal framework currently in Myanmar, experiences in BiH and Iraq concerning inconsistent laws and unclear precedence of laws and decisions may be relevant. The unclear patchwork of laws in Iraq played a significant role in preventing a more successful resolution of the land disputes there.<sup>360</sup> Similar problems were seen in BiH at first, but the decision to make the CRPC's binding decisions take precedence over conflicting laws allowed for the resolution process to achieve greater success.<sup>361</sup> In Myanmar, this process should include not just making the legal structure consistent and clear, but also resolving the unclear legal state of refugees, IDPs, and residents of customary land.

**13) ADDRESS HUMAN RIGHTS AND ENSURE NON-DISCRIMINATION:**  
*Design a mechanism that includes ongoing assessment of potential for discrimination and adverse human rights impact in compliance with international standards.*

An explicit Pinheiro principle, and one whose importance can be seen in the case studies, is that any process should be non-discriminatory. This is also a requirement under the international treaties introduced in Part II. The legitimacy of processes that appear to favor one group or that have disparate effects on certain populations are more easily called into jeopardy and are often less effective at adequately addressing the underlying concerns, as seen in Iraq and Kosovo.<sup>362</sup> There was a failure on the part of all the countries studied, to some degree, to comply with international standards regarding affirmative non-discrimination against women, ethnic minorities, and indigenous people, as demonstrated by a lack of reliance on international treaties or law regarding the same.

Discriminatory effects can be unintended or not immediately evident and so it is critical to consider the potential adverse human rights and equality implications of land restitution and reform mechanisms. For example, experts have noted that the formal registration of land where only one individual can be the owner of that land can lead to the formalization of a patriarchal land system, where the male head of household is listed as the owner of the land.<sup>363</sup> The incorporation of customary institutions and land tenure can raise similar concerns of discrimination on the basis of gender or other unlawful basis, as can the implementation of a statutory tenure system without proper consideration of the gendered effects it may have (such as giving formal title only to the male head of household). As such, any land restitution or land reform process must be scrutinized to assess and remedy discrimination impact at the outset.

## Appendix: Assessment Chart

### ASSESSMENT OF LAND RESTITUTION EFFORTS BASED ON PINHEIRO PRINCIPLES (UN PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS)

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i><b>Was the land restitution and land reform process a success?</b></i>	<p>Moderate:</p> <p>Within mandate to return land rights to pre-conflict status quo, seen as success. Did not address broader property concerns, specifically concerning vague, inconsistent laws.</p>	<p>Moderate:</p> <p>Mediation model for addressing conflict was introduced by the UN Transitional Administration in 2000 and is now managed by East Timor's Land and Property Directorate. Despite difficult circumstances and limited resources, mediation has been successful in managing a large number of potentially violent disputes.</p>	<p>Too soon to tell:</p> <p>President Joko Widodo just announced Indonesia's land reform program in Feb 2017, and funding from the World Bank was approved in March 2017. The grant is to help Indonesia's indigenous and local communities secure land rights and manage forests.</p>	<p>No:</p> <p>While some claimants were able to reclaim possession of houses, process was backlogged, slow, and political. Continuing turbulence in country affected ability of system to be truly tested.</p>	<p>Low-moderate:</p> <p>Within mandate to return land rights to pre-conflict status quo, successfully resolved many claims but with lingering concerns. Did not address broader property concerns, specifically concerning vague, inconsistent laws.</p>	<p>No:</p> <p>Process accompanied by violence and paramilitaries.</p>



	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>To what extent was the state-devised procedure transparent?</i>	Moderate	Moderate:  It was first implemented under supervision of United Nations.	Moderate	Moderate	Moderate	N/A

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Did the state facilitate public access to reform program?</i>	<p>Yes:</p> <p>Over 90% of those displaced by conflict received binding rights to their pre-conflict properties (though not all were able to repossess).</p>	<p>Yes, generally:</p> <p>The East Timor Judicial Monitoring Program found that resolving land disputes through mediation was more effective than going through the court system; local settlements of disputes are seen as subject to less corruption, but a large limitation is that the Directorate cannot mediate land owned by the state, or where the state or government official is a party to the dispute.</p>	<p>Yes:</p> <p>The Indonesian government wants to reduce inequality by redistributing land to rural groups of people. 12.7 million hectares are set aside to be distributed and managed by indigenous people.</p>	<p>Yes:</p> <p>Active attempts to make process known included awareness programs and web-based applications/information.</p>	<p>Yes:</p> <p>Final deadline for claims extended three times. Received 27,000 claims.</p>	N/A

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>To what extent was there transparency when mechanism was created?</i>	N/A:  But appears to have been transparent process: international community heavily involved, insisted on reliable monitors, commission reflected inclusive approach (ethnic diversity).	Transparent:  Originally created by the UN Transitional Administration.	Relatively transparent:  Largely created by Indonesian government, but also in conjunction with the World Bank. There has been much press covering the program.	Low:  Largely created within government.	N/A:  But appears to have been transparent process: international community heavily involved.	High
<i>What was the level of transparency in resolution of each individual dispute?</i>	N/A:  But appears to have been transparent process that followed procedures.	Seems relatively transparent:  A party brings the dispute and then the opposite parties are notified; mediation does not commence until all parties are present.	N/A:  Resolution of individual disputes has not yet occurred.	High:  Because of the judicial and appeal process, relatively high transparency about each case.	N/A:  But appears to have been transparent process that followed procedures.	N/A

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>To what extent was the state-devised procedure non-discriminatory?</i>	High:  Commission reflected ethnic diversity and policies adopted to ensure all ethnic groups treated equally. Some concerns about "victor's solution" regarding treatment of soldiers.	Moderate:  Given that the disputes are mediated at a local level, discrimination is probably lessened. However, the state and government officials are exempt from this mediation.	Moderate:  The program's purpose is to increase welfare of rural communities and indigenous people. However, the details of the program are unclear.	Low:  Process was generally seen to favor majority Shia in power post-2003. Informal renters or farmers with poor documentation (often minorities) had no recourse.	Low-moderate:  Process was facially non-discriminatory but ended up favoring displaced Albanian population over Serbs, no protections for minority populations (such as Roma).	Low:  Process was highly discriminatory .
<i>To what extent was the state-devised procedure gender-sensitive?</i>	No prominent efforts to integrate gender-sensitive approach.	N/A	No prominent efforts to integrate gender-sensitive approach.	No prominent efforts to integrate gender-sensitive approach.	No prominent efforts to integrate gender-sensitive approach. Concerns that property system more broadly unfair to women.	N/A
<i>What type of property was eligible for claims?</i>	All (residential, commercial, agricultural)	All land	Agrarian land	All real estate	Residential	N/A

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Are agencies assigned to deal with restitution program properly staffed given their caseload?</i>	Yes:  Dispute resolution committee (CRPC) appears to have been adequately staffed, though it relied on local, domestic agencies for implementation of decisions.	Yes:  Appears to be properly staffed.	Too soon to tell:  The Indonesian government has urged regional administration to coordinate with relevant agencies to speed the implementation of agrarian reform program.	No:  Significant backlog of cases, at initial decision and appeal level.	Yes:  Dispute resolution committees (Directorate, and others) appear to have been adequately staffed. Hindered by poor agency cooperation.	No
<i>Are agencies assigned to deal with restitution program properly funded?</i>	Yes:  CRPC appears to have been adequately funded. Compensation Fund, which was supposed to be funded by international donors and support monetary compensation, was not funded.	Yes:  Appears to be adequately funded, mediation activities are funded by the Directorate, which is a self-funding agency as a result from leases over public land.	Likely yes:  Appears to be adequately funded; the World Bank has approved a \$6.25M grant to help specifically with Indonesia's indigenous communities.	No:  Compensation depended on government providing compensation, which rarely occurred.	Yes:  Dispute resolution committees (Directorate, and others) appear to have been adequately funded.	No

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>To what degree were agencies independent from state or partisan control?</i>	High:  International community heavily involved, insisted on neutrality. Initial problems with local obstruction were addressed.	Moderate:  At the beginning, it was implemented by the UN, but now it is run by a directorate most likely tied to the state; when mediators are not mediating, they are performing other land administration duties.	Moderate:  It seems as though the bulk of the on-the-ground implementation will be through regional administrative agencies, with oversight from the state.	Moderate:  CRRPD/PCC were independent, but government had control over some aspects of process.	High:  International community heavily involved, insisted on neutrality.	Low:  Process co-opted by ZANU-FP (ruling party).
<i>Does the state provide specific guidelines to particular agencies so as to ensure standardized institutional practices?</i>	Yes	At the outset, yes:  The mediators received intensive training in 2001 and 2005 but there are no mechanisms for ongoing or recurrent mediation training.	Unclear:  It is too soon to know the details of the program.	Yes	Yes	No:  Land largely distributed on basis of party affiliation.

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>What was the proportion of IDPs that submitted a claim to the agency tasked with implementing the program, and how quickly were these claims resolved?</i>	<p>N/A, but high proportion:</p> <p>Two million were displaced and within nine years, one million had returned.</p>	<p>About a third:</p> <p>Of the 972 disputes brought to the Land and Property Directorate between December 2000 and January 2006, 314 were resolved through mediation.</p>	<p>N/A:</p> <p>Still unclear.</p>	<p>N/A:</p> <p>But about one million were displaced (internally and abroad) due to policies related to CRRPD/PCC mandate and about 150,000 claims were placed by 2009. 67,000 had been resolved.</p>	<p>N/A:</p> <p>But high proportion.</p>	<p>N/A:</p> <p>Recipients were not IDPS.</p>
<i>What was the proportion of IDPs whose land rights have been restored, or alternatively, have been given restitution, since the inception of the restitution/restoration program?</i>	<p>High:</p> <p>Within nine years, 90% of claimants displaced by conflict received binding rights to their pre-conflict properties (though not all were able to repossess).</p>	N/A	N/A	<p>Low:</p> <p>By 2009, about 67,000 of 150,000 claims were resolved. Only 1,000 had been compensated. Significant backlog (claims and appeals).</p>	<p>High:</p> <p>99.7% of 27,000 claims completed, generally resulting in returning land rights.</p>	<p>Moderate:</p> <p>127,000 (total, vast majority not IDPS).</p>

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>To what extent were affected IDP communities consulted as to the reform efforts and what were the means by which consultations were implemented?</i>	N/A:  Appears low - driven by international, government actors.	N/A:  Mediation mechanism.  Success:  Significant consultation on ad hoc community dispute resolution.	N/A:  Appears to be a top-down reform by the state in conjunction with international actors.	N/A:  Appears low - driven by sitting government.	N/A:  Appears low - driven by international, government actors.	Low:  Process largely designed by ZANU-PF.
<i>To what extent did the state provide an effective means to register land that has been restored to its original owners?</i>	Moderate:  Restored land was filed in newly created "cadastral database," though not if claimant did not originally have formal property rights. Property system overall remains poorly managed.	N/A	High:  Indonesia has an extensive registration system, but is ineffective in its high cost and poor management.	High:  Registration available, including through online system.	Moderate:  Restored land was registered, though not if claimant did not originally have formal property rights. Property system overall remains poorly managed.	N/A



	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Extent to which reform effort incorporates and recognizes customary means of property ownership (i.e: collective means of ownership)</i>	High:  Process recognized rights of those who had occupied socially-owned property.	High:  This mediation program was created to address disputes over customary land ownership.	High:  The agrarian land reform program is targeted towards restoring land to customary communities.	Low:  Process recognized only those with significant documentation of claim.	Low:  Process did not recognize rights of those in illegal housing.	Low:  Uniform registration process.

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>In case of an undocumented claim (physical evidence of an IDPs ownership has been destroyed or does not exist), has the state provided for an impartial, speedy judicial/ administrative procedure by which to determine facts related to such undocumented claims?</i>	N/A	N/A	N/A	N/A, but appears low:  Process recognized only those with significant documentation of claim.	N/A	N/A:  Recipients were not IDPS.

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Has the state provided for a means to address and protect the human rights of legitimate secondary owners acting in good faith?</i>	Yes:  Condition of reciprocity.	N/A	N/A	Yes:  Compensation.	Yes:  Generally, compensation.	No:  White farmers largely forced off their land absent any compensation.
<i>Are (and the extent to which) implementation efforts carried out through the rule of law?</i>	Yes	Yes:  The mediation system is embedded in land administration rather than judicial administration, which allows remedies unavailable in the courts, such as selling, leasing, dividing, or swapping land.	Yes	Yes	Yes	No:  Coercive evictions were largely carried outside legal process by violent paramilitary groups.

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>Has the state, through implementing statute(s), clearly delineated those entitled to restitution/land restoration?</i>	<p>Yes:</p> <p>Individuals who had abandoned their property during the 1990s conflict, including those without formal property rights.</p> <p>Not those who had their property socialized under Yugoslavia.</p>	N/A	Yes	<p>Yes:</p> <p>Individuals who had property seized or lost due to displacement, discriminatory policies under Ba'ath regime.</p> <p>Not those whose property was damaged.</p>	<p>Yes:</p> <p>Individuals who lost property due to the discriminatory policies after 1989; individuals who voluntarily entered into informal transactions of residential property after 1989; individuals who fled from property during the war in 1998–99.</p> <p>Not those who had their property socialized under Yugoslavia.</p>	No

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i>What form of restitution offered to IDPs was favored?</i>	Restoration.	Selling, leasing, dividing, or swapping land.	Restoration.	Restoration.	Restoration.	N/A : Recipients were not IDPS.
<i>If monetary restitution: Did an independent tribunal determine that restoration of land rights was not possible?</i>	N/A	N/A	N/A	N/A	N/A	N/A

	COUNTRY					
FACTOR	BOSNIA & HERZEGOVINA	EAST TIMOR	INDONESIA	IRAQ	KOSOVO	ZIMBABWE
<i><b>If addressed through restoration: Has the state provided a monetary restitution mechanism for those who do not wish to return voluntarily?</b></i>	<p>No:</p> <p>A Compensation Fund was envisioned but funding relied on international donors and was never realized.</p>	N/A	No	<p>No:</p> <p>Compensation was theoretically possible for most claimants, but rarely paid by government.</p>	<p>Sometimes:</p> <p>Only particular groups were eligible: secondary occupants during the conflict, where original owner lost property due to discriminatory laws (this group was favored in restoration process).</p>	N/A

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<sup>1</sup> The report was drafted by the International Human Rights Clinic (IHRC) at the University of Chicago Law School for presentation at Oxfam in Myanmar's "Learning Roundtable on Land Restitution" which took place on March 22, 2017 in Yangon, Myanmar. The report authors were IHRC students Amanda Ng, Allison Hugi, Roe Talmor and IHRC director and assistant professor Claudia Flores. The report was edited by IHRC lecturer Nino Guruli. Cover page designed by Salome Guruli. The report relies on extensive documentary research and information collected during a field visit to Myanmar in March 2017. During the field visit, interviews were conducted with representatives from the Norwegian Refugee Council, Oxfam, Trocaire, ABZ Kachin, Kachin Baptist Convention, Joint Strategic Team, International Commission of Jurists, GRET, USAID, The Border Consortium, and the Land Core Group. Interview Notes are on file with researchers.

<sup>2</sup> Beina Xu and Eleanor Albert, *Understanding Myanmar* (Council on Foreign Relations, Mar 25, 2016), available at <http://www.cfr.org/human-rights/understanding-myanmar/p14385>.

<sup>3</sup> Id.

<sup>4</sup> Alex Bellamy, *The 21<sup>st</sup> Century Panglong: Myanmar's New Hope for Peace* (IPI Global Observatory, Aug 31, 2016), available at <https://theglobalobservatory.org/2016/08/myanmar-21st-century-panglong-aung-san-su-kyi>.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Xu and Albert (cited in note 2).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Xu and Albert (cited in note 2).

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Xu and Albert (cited in note 2).

<sup>16</sup> Natalia Scurrah and Philip Hirsch, *The Political Economy of Land Governance in the Mekong Region* \* 1 (Mekong Region Land Governance (MRLG), Nov 2015), available at [http://mrlg.org/wp-content/uploads/2015/12/Political\\_Economy\\_of\\_Land\\_Governance\\_in\\_Region\\_FA.pdf](http://mrlg.org/wp-content/uploads/2015/12/Political_Economy_of_Land_Governance_in_Region_FA.pdf) [accessed Aug 10, 2017].

<sup>17</sup> Id.

<sup>18</sup> Bellamy (cited in note 4).

<sup>19</sup> The FAO definition of land tenure is used because the FAO is one of the international organizations that is most involved in technical assistance on land tenure systems. It has, for instance, promulgated a system of principles to lead countries considering land restitution and land reform (the "Voluntary Guidelines" discussed in Part VI.2.B). Food and Agriculture Organization (FAO), *Land Tenure and Rural Development* \* 7 (Land Tenure Series No. 3, 2002), available at <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf>.

<sup>20</sup> Food and Agriculture Organization (FAO), *Access to Rural Land and Land Administration after Violent Conflict* \*20 (Land Tenure Series No. 8, 2005), available at <http://www.fao.org/3/a-y9354e.pdf> [accessed Aug 23, 2017].

<sup>21</sup> Id.

<sup>22</sup> United Nations Human Settlements Programme (UN-HABITAT) for the United Nations Interagency Framework Team for Preventative Action, *Toolkit and Guidance for Preventing and*

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*Managing Land and Natural Resources Conflict: Land and Conflict* \*18 (2012), available at [http://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report\\_1037.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_1037.pdf) [accessed Aug 23, 2017].

<sup>23</sup> United Nations Human Settlements Programme (UN-HABITAT), *Secure Land Rights for All* \*5 (Global Land Tool Network, Nairobi, 2008), available at [https://www.gltn.net/jdownloads/GLTN%20Documents/secure\\_land\\_rights\\_for\\_alleng2008.pdf](https://www.gltn.net/jdownloads/GLTN%20Documents/secure_land_rights_for_alleng2008.pdf).

<sup>24</sup> UN-HABITAT, *Land and Conflict* (cited in note 22).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Myanmar* (Transparency International, 2017), available at <https://www.transparency.org/country/MMR>.

<sup>31</sup> *Id.*

<sup>32</sup> FAO, *Land Tenure and Rural Development* at 7 (cited in note 19).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar: Questions and Answers* (Norwegian Refugee Council, Mar 2017), available at [https://www.nrc.no/globalassets/pdf/reports/dis5182-hlp-guide-on-claiming-hlp-restitution---myanmar-v9\\_5-web-5.pdf](https://www.nrc.no/globalassets/pdf/reports/dis5182-hlp-guide-on-claiming-hlp-restitution---myanmar-v9_5-web-5.pdf).

<sup>37</sup> OHCHR and UN-HABITAT, *The Right to Adequate Housing* (Fact Sheet No. 21/Rev. 1, Geneva, 2009), available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

<sup>38</sup> UN-HABITAT, *Land and Conflict* (cited in note 22).

<sup>39</sup> For a more in-depth overview of land restitution rights (including when they are triggered and who owns the right), and the choice between restoration and compensation policies, see Norwegian Refugee Council, *An Introductory Guide* (cited in note 36).

<sup>40</sup> OHCHR, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the Pinheiro Principles* \* 92 (Mar 2007), available at [http://www.ohchr.org/Documents/Publications/pinheiro\\_principles.pdf](http://www.ohchr.org/Documents/Publications/pinheiro_principles.pdf). Oxfam Learning Roundtable on Land Restitution (Mar 22, 2017)(on file with author).

<sup>41</sup> OHCHR, *Handbook on Housing and Property Restitution* (cited in note 40); Oxfam Learning Roundtable on Land Restitution (cited in note 40); Norwegian Refugee Council, *An Introductory Guide* (cited in note 36). For an example of these concerns, see the country case study on Kosovo in Part V.7.

<sup>42</sup> Oxfam Learning Roundtable on Land Restitution (cited in note 40).

<sup>43</sup> OHCHR, *Handbook on Housing and Property Restitution* Principle 21 (cited in note 40); Food and Agriculture Organization (FAO), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* \* Sec14 (2012), available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

<sup>44</sup> Oxfam Learning Roundtable on Land Restitution (cited in note 40).

<sup>45</sup> OHCHR, *Handbook on Housing and Property Restitution* (cited in note 40).

<sup>46</sup> T. David Mason, *Take Two Acres and Call Me in the Morning: Is Land Reform A Prescription for Peasant Unrest?* 60 J Polit 199 (1998).

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 28.

<sup>50</sup> *Id.* at 29.



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<sup>51</sup> FAO, *Land Tenure and Rural Development* (cited in note 19).

<sup>52</sup> Elisabeth Wickeri and Anil Kalhan, *Land Rights Issues in International Human Rights Law*, 4 Malaysian J HR 17 (2010).

<sup>53</sup> The Universal Declaration of Human Rights (UDHR), in Article 17, states that “[e]veryone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property.” Universal Declaration of Human Rights, GA Res 217, UN GAOR, 3d Sess, UN Doc A/810 (1948). However, because no similar provision is found in the ICCPR or ICESCR, experts have posited that states are likely resistant to a right regarding ownership, tenure, and land use and so this right is not established under international law. See Denise González Núñez, *Peasants’ Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law*, 14 HR L Rev 589, 599 (2014).

<sup>54</sup> Wickeri and Kalhan, 4 Malaysian J HR at 17 (cited in note 54).

<sup>55</sup> United Nations Human Rights Office of the High Commissioner, *Land and Human Rights*, available at <http://www.ohchr.org/EN/Issues/LandAndHR/Pages/LandandHumanRightsIndex.aspx>.

<sup>56</sup> Wickeri and Kalhan, 4 Malaysian J HR at 17 (cited in note 54).

<sup>57</sup> United Nations Press Release, *General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President* (Sep 13, 2007), available at <http://www.un.org/press/en/2007/ga10612.doc.htm>.

<sup>58</sup> United Nations Press Release, *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, available at <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

<sup>59</sup> The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties. In its interpretations, the Human Rights Committee has acknowledged the connection between cultural rights and land rights in Article 27 (concerning cultural rights for minorities) of the ICCPR. By acknowledging the evidence that, for indigenous communities, a particular way of life is associated with the use of their lands, Article 27 emphasizes the connection between cultural rights and land rights, thus providing a specific protection for indigenous peoples’ land rights.

<sup>60</sup> The Convention establishes a right for indigenous peoples to exercise control over their own economic, social, and cultural development.

<sup>61</sup> Jérémie Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* 123 (2d ed, 2016).

<sup>62</sup> United Nations Human Rights Office of the High Commissioner, *Treaty Ratification Status of Myanmar*, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN) [accessed Aug 10, 2017].

<sup>63</sup> UN-HABITAT, *Land and Conflict* (cited in note 22).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Resolution 34/180, art 14, ¶ 2(g) (1979).

<sup>70</sup> CEDAW at art 1, ¶ (1)(h) (cited in note 69).

<sup>71</sup> According to Articles 10 and 18 of the Vienna Convention on the Law of Treaties from 1969, when a signature is subject to ratification, acceptance, or approval, the signature does not establish a nation’s consent to be bound.

<sup>72</sup> UN-HABITAT, *Land and Conflict* (cited in note 22).

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<sup>73</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) makes a relatively direct connection between food and land rights in Article 11, referencing the need to “improve methods of production, conservation and distribution of food... by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.” The General Comment 12 on the right to adequate food states that ensuring access to food or resources for food requires States to implement full and equal access to economic resources, including the right to ownership of land for all people. International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (Dec 16, 1966). Economic and Social Council, *General Comment No 12: The Right to Adequate Food (art 11)*, E/C.12/1999/5 (May 12, 1999).

<sup>74</sup> In General Comment 4 (an interpretation of the ICESCR) written by the Committee on Economic, Social, and Cultural Rights (CESCR), the Committee addresses the right to adequate housing and emphasizes that housing is not to be interpreted narrowly, but should be seen as the right to live somewhere in security, peace, and dignity. Article 2(1) of the ICESCR requires that states use all appropriate means to realize the right to housing, which includes refraining from forced evictions and ensuring that the law is enforced against its agents or third parties who carry out forced evictions. Committee on Economic, Social, and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (art 11(1) of the Covenant)* (Jan 1, 1992). Article 17 of ICCPR echoes this message. In addition, Article 2(3) of the ICCPR also requires state parties to provide an effective remedy for persons whose rights have been violated, which includes adequate compensation for the property. This is particularly pertinent in rural areas, where forced evictions (often carried out in the name of development) tend to exacerbate the violations of interrelated rights. Therefore, forced evictions from land are tied to violations of multiple human rights. International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (Dec 16, 1966).

<sup>75</sup> OHCHR, Treaty Ratification Status of Myanmar (cited in note 62).

<sup>76</sup> Helpful resources that provide significant detail on the challenges facing Myanmar include: *Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Program* (Norwegian Refugee Council, Mar 2017).

<sup>77</sup> Norwegian Refugee Council, *Restitution in Myanmar* (cited in note 76).

<sup>78</sup> *Transparency Under Scrutiny: Information Disclosure by the Parliamentary Land Investigation Committee in Myanmar* 3 (Mekong Region Land Governance, Feb 2017).

<sup>79</sup> *Id* at 5.

<sup>80</sup> Scurrah and Hirsch, *The Political Economy of Land Governance in the Mekong Region* (cited in note 16).

<sup>81</sup> *Burma*, The World Factbook (CIA, updated Jan 12, 2017), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

<sup>82</sup> IHRC interview with GRET (Mar 20, 2017)(on file with author).

<sup>83</sup> Elliot Brennan and Min Zaw Oo, *Peace, alliance, and inclusivity: Ending conflict in Myanmar* (Brookings, Apr 1, 2016), available at <https://www.brookings.edu/opinions/peace-alliance-and-inclusivity-ending-conflict-in-myanmar/>.

<sup>84</sup> *Id*.

<sup>85</sup> *KIO: Kachin Independence Organization*, Myanmar Peace Monitor (BNI, updated 2017), available at <http://www.mmpeacemonitor.org/component/content/article/57-stakeholders/155-kio>; *KPC: KNU/KNLA Peace Council*, Myanmar Peace Monitor (BNI, updated 2017), available at <http://www.mmpeacemonitor.org/background/economic-and-political-stakes/162-kpc>.

<sup>86</sup> *State and Region Governments in Myanmar* \* 9–20, 51–67 (Asia Foundation, Sept 2013), available at <https://asiafoundation.org/resources/pdfs/StateandRegionGovernmentsinMyanmarCESDTAF.PDF>.

<sup>87</sup> *Id*.

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<sup>88</sup> Hamish Nixon, et al, *State and Region Governments in Myanmar* \* 4 (Asia Foundation: Policy Dialogue Brief, Sept 2013), available at [http://asiafoundation.org/wp-content/uploads/2016/10/State-Region-Government\\_Policy-Brief\\_ENG.pdf](http://asiafoundation.org/wp-content/uploads/2016/10/State-Region-Government_Policy-Brief_ENG.pdf).

<sup>89</sup> *Id* at 6.

<sup>90</sup> *Id* at 7.

<sup>91</sup> *Id*.

<sup>92</sup> *Id*. *Special Economic Zones in Myanmar and the State Duty to Protect Human Rights* (International Commission of Jurists, Feb 2017).

<sup>93</sup> *Id*.

<sup>94</sup> *Burma: Property Rights and Resource Governance* \* 4 (USAID, 2013), available at [http://www.globalprotectioncluster.org/\\_assets/files/field\\_protection\\_clusters/Myanmar/files/HLP%20AoR/Land\\_Tenure\\_Profile\\_Myanmar\\_2013\\_EN.pdf](http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Myanmar/files/HLP%20AoR/Land_Tenure_Profile_Myanmar_2013_EN.pdf).

<sup>95</sup> *Id*.

<sup>96</sup> *Id* at 4, 6.

<sup>97</sup> *Id*.

<sup>98</sup> USAID, *Burma* \*5 (cited in note 94).

<sup>99</sup> USAID, *Burma* \*10 (cited in note 94).

<sup>100</sup> *Id* at 13.

<sup>101</sup> *Id*.

<sup>102</sup> *Id*.

<sup>103</sup> USAID, *Burma* \*13 (cited in note 94).

<sup>104</sup> Asia Foundation, *State and Region Governments in Myanmar* \* 61 (cited in note 86).

<sup>105</sup> Nixon, *State and Region Governments in Myanmar* \* 2 (cited in note 88).

<sup>106</sup> Constitution of the Republic of the Union of Myanmar (2008).

<sup>107</sup> The Farmland Law 2012 (The Republic of the Union of Myanmar), available at <http://extwprlegs1.fao.org/docs/pdf/mya139026.pdf>.

<sup>108</sup> The Vacant, Fallow and Virgin Lands Management Law 2012 (The Republic of the Union of Myanmar), available at <https://www.lift-fund.org/sites/lift-fund.org/files/uploads/Vacant,%20Fallow%20.....%20Land%20Law.pdf>.

<sup>109</sup> *Myanmar: Comprehensive Solutions Needed for Recent and Long-Term IDPs Alike* (Internal Displacement Monitoring Centre, 2014), available at <http://www.internal-displacement.org/south-and-south-east-asia/myanmar/2014/myanmar-comprehensive-solutions-needed-for-recent-and-long-term-idps-alike>.

<sup>110</sup> Constitution of the Republic of the Union of Myanmar, arts 37(a), 372 (2008).

<sup>111</sup> Constitution of the Republic of the Union of Myanmar, art 37(a) (2008).

<sup>112</sup> *Id*.

<sup>113</sup> Note that the state's obligation only extends to "citizens." The term excludes aliens but also certain indigenous groups who do not have official citizenship status.

<sup>114</sup> Constitution of the Republic of the Union of Myanmar, art 37(c) (2008).

<sup>115</sup> *Id*.

<sup>116</sup> Constitution of the Republic of the Union of Myanmar, art 372 (2008).

<sup>117</sup> Constitution of the Republic of the Union of Myanmar, art 356 (2008).

<sup>118</sup> See S. Mark (Siu Siu), *Are the Odds of Justice Stacked Against Them? Challenges and Opportunities for Securing Land Claims by Smallholder Farmers in Myanmar*, 48 *Critical Asian Studies* 443 (2016).

<sup>119</sup> *Id* at 446.

<sup>120</sup> *Id*.

<sup>121</sup> See Myanmar Centre for Responsible Business, *Myanmar Centre for Responsible Business Briefing Paper* (Institute for Human Rights and Business, 2015), available at <http://www.myanmar-responsiblebusiness.org/pdf/2015-04-02-LAND-Briefing.pdf>.

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- <sup>122</sup> The Farmland Law 2012 (cited in note 107).
- <sup>123</sup> The Vacant, Fallow and Virgin Lands Management Law 2012 (cited in note 108).
- <sup>124</sup> The Farmland Law 2012 at ch 3 sec 9(b) (cited in note 107).
- <sup>125</sup> The Farmland Law 2012 at ch 3 sec 9(c) (cited in note 107).
- <sup>126</sup> The Farmland Law 2012 at ch 13 sec 43(a) (cited in note 107).
- <sup>127</sup> The Farmland Law 2012 at ch 8 (cited in note 107).
- <sup>128</sup> See Farmland Law 2012 at ch 1 sec 3(a) (cited in note 107) (“farmland” means designated lands as; paddy land; ya land; kiang land; perennial plant land; dhani land; garden land; land for growing of vegetables and flowers; and alluvial island. In this expression, it does not include land situated within any town or village boundary used for dwelling, religious building and premises, and public-owned land which is not used for agriculture purpose”).
- <sup>129</sup> See S. Mark (Siu Siu), *Are the Odds of Justice Stacked Against Them?* at 440 (cited in note 118).
- <sup>130</sup> Id.
- <sup>131</sup> Id.
- <sup>132</sup> The Vacant, Fallow and Virgin Lands Management Law 2012 at ch 2 sec 3(a)(cited in note 108).
- <sup>133</sup> Id at ch 2 sec 3(b).
- <sup>134</sup> The Vacant, Fallow and Virgin Lands Management Law 2012 at ch 1 sec 2(f) (cited in note 108).
- <sup>135</sup> Id at ch 1 sec 2(e).
- <sup>136</sup> See Robert J. Oberndorf, *Legal Review of Recently Enacted Farmland and Vacant, Fallow and Virgin Lands Management Law* \*16 (Land Core Group, Nov 2012), available at [http://www.forest-trends.org/publication\\_details.php?publicationID=3274](http://www.forest-trends.org/publication_details.php?publicationID=3274); See also Nathan Willis, *Land Disputes and the Ongoing Development of the Substantive Rule of Law in Myanmar (Burma)*, in S Kierkegaard, ed, *Law & Practice: Critical Analysis and Legal Reasoning* 882, 888 (International Association of IT Lawyers, Denmark, 2013).
- <sup>137</sup> Id.
- <sup>138</sup> The Vacant, Fallow and Virgin Lands Management Law 2012 at ch 4 sec 16(b) (cited in note 108); *Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices* 23 (Namati, 2015).
- <sup>139</sup> *An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar: Questions and Answers* 4 (Norwegian Refugee Council, Mar 2017).
- <sup>140</sup> Oxfam Learning Roundtable on Land Restitution (cited in note 40); Norwegian Refugee Council, *Restitution in Myanmar* (cited in note 76).
- <sup>141</sup> Sie Sue Mark, *Land Reform and Local Governance in National Dialogue Processes* 8 (Felm, Common Space Initiative, 2017); Tin Htet Paing, *Parliamentary Committee: 6,000 Land Confiscation Complaints Yet to Be Addressed* (Irrawaddy, Apr 27, 2016).
- <sup>142</sup> OHCHR, *Handbook on Housing and Property Restitution* (cited in note 40).
- <sup>143</sup> *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* \* 3–5 (Centre on Housing Rights and Evictions, 2008), available at <https://2001-2009.state.gov/documents/organization/99774.pdf>.
- <sup>144</sup> Id at 5.
- <sup>145</sup> Scott Leckie, et al, *The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (“The Pinheiro Principles”) 7 (2015)
- <sup>146</sup> Id.
- <sup>147</sup> OHCHR, *Handbook on Housing and Property Restitution* at 24(cited in note 40) (Principles 2.1 and 2.2)
- <sup>148</sup> Id (Principle 2.1).
- <sup>149</sup> Leckie, *The United Nations Principles* at 22 (cited in note 145).
- <sup>150</sup> OHCHR, *Handbook on Housing and Property Restitution* at 24 (cited in note 40).
- <sup>151</sup> FAO, *Voluntary Guidelines* (cited in note 43).
- <sup>152</sup> Id at 3–37.

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- <sup>153</sup> Leckie, *The United Nations Principles* at 22 (cited in note 145).
- <sup>154</sup> Renee Giovarelli and David Bledsoe, *Land Reform in Eastern Europe* \* 24 (Rural Development Institute, 2001), available at <ftp://ftp.fao.org/docrep/fao/007/AD878E/AD878E00.pdf>.
- <sup>155</sup> Mari Katayanagi, *Property Rights in the Statebuilding of Bosnia and Herzegovina*, in Shinichi Takeuchi, *Confronting Land and Property Problems for Peace* 132 (Routledge 2014).
- <sup>156</sup> Id at 135.
- <sup>157</sup> Id.
- <sup>158</sup> Id.
- <sup>159</sup> Id at 135.
- <sup>160</sup> Id at 136.
- <sup>161</sup> Id at 132, 137.
- <sup>162</sup> The Office of the High Representative (OHR) is an ad hoc international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. Office of the High Representative, *General Information* (2015), available at [http://www.ohr.int/?page\\_id=1139](http://www.ohr.int/?page_id=1139) [accessed Aug 22, 2017].
- <sup>163</sup> Katayanagi, *Property Rights* at 134 (cited in note 155).
- <sup>164</sup> Id at 132 (internal quotation marks omitted).
- <sup>165</sup> Id at 137.
- <sup>166</sup> Id at 138.
- <sup>167</sup> Morten Hartvigsen, *Land Reform and Law Fragmentation in Central and Eastern Europe*, 36 Land Use Pol'y 330, 333 (2014).
- <sup>168</sup> This was a relatively ambitious peace agreement. More so than, for example, the Kosovo agreement from a few years later. Jose-Maria Arraiza and Massimo Moratti, *Getting the Property Questions Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)*, 21 Intl J Refugee L 421, 425 (2009).
- <sup>169</sup> Id at 138–39.
- <sup>170</sup> Id at 139–40.
- <sup>171</sup> Katayanagi, *Property Rights* at 142 (cited in note 155).
- <sup>172</sup> *Bosnia and Herzegovina: Broader and Improved Support for Durable Solutions Required* \* 204 (Internal Displacement Monitoring Centre, Aug 28, 2008), available at <http://www.internal-displacement.org/assets/library/Europe/Bosnia-and-Herzegovina/pdf/Bosnia-and-Herzegovina-August-2008.pdf>.
- <sup>173</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 426 (cited in note 168).
- <sup>174</sup> Katayanagi, *Property Rights* at 141 (cited in note 155).
- <sup>175</sup> Madeline Garlick, *Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina*, 19 Refugee Survey Q (UNHCR) 64, 71 (2000).
- <sup>176</sup> Id.
- <sup>177</sup> Id.
- <sup>178</sup> Id at 77–79.
- <sup>179</sup> Id.
- <sup>180</sup> Anne Davies, *Restitution of Land and Property Rights*, 21 FRM 12, 13 (2004).
- <sup>181</sup> Id at 81.
- <sup>182</sup> Id at 73.
- <sup>183</sup> Id.
- <sup>184</sup> Garlick, *Protection for Property Rights* at 75 (cited in note 175); Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study* 5 (OSCE 2003).
- <sup>185</sup> Prettitore, *The Right to Housing and Property Restitution* at 5 (cited in note 184).
- <sup>186</sup> Id at 13.
- <sup>187</sup> Katayanagi, *Property Rights* at 144 (cited in note 155).

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- <sup>188</sup> Id.
- <sup>189</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 437 (cited in note 168).
- <sup>190</sup> Id at 426.
- <sup>191</sup> Amy Ochoa Carson, *East Timor's Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 (2) Ind Intl & Comp L Rev 395, 401 (2007).
- <sup>192</sup> Id at 402.
- <sup>193</sup> Id.
- <sup>194</sup> Id.
- <sup>195</sup> Id at 403.
- <sup>196</sup> Id at 404.
- <sup>197</sup> Id at 405.
- <sup>198</sup> Id at 407.
- <sup>199</sup> Id at 407.
- <sup>200</sup> Daniel Fitzpatrick, *Mediating Land Conflict in East Timor*, in 2 *Making Land Work* 175, 176 (Australian Agency for International Development, 2008).
- <sup>201</sup> Id at 177.
- <sup>202</sup> Id.
- <sup>203</sup> Id at 181.
- <sup>204</sup> Id at 182.
- <sup>205</sup> Daniel Fitzpatrick, *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor* \*15 (UNHCR Working Paper No 58, Feb 2002), available at <http://www.unhcr.org/publ/RESEARCH/3c8399e14.pdf>.
- <sup>206</sup> Id at 21.
- <sup>207</sup> Id at 24.
- <sup>208</sup> Id at 25.
- <sup>209</sup> Erna Heryani and Chris Grant, *Land Administration in Indonesia* (International Federation of Surveyors (FIG) 2004), available at [https://www.fig.net/resources/proceedings/fig\\_proceedings/jakarta/papers/ps\\_04/ps\\_04\\_3\\_heryani\\_grant.pdf](https://www.fig.net/resources/proceedings/fig_proceedings/jakarta/papers/ps_04/ps_04_3_heryani_grant.pdf) [accessed Aug 10, 2017].
- <sup>210</sup> USAID, *Indonesia*, available at <https://www.land-links.org/country-profile/indonesia/> [accessed Aug 10, 2017].
- <sup>211</sup> Id.
- <sup>212</sup> Andrea Alforte, et al, *Communities at Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions* (Rights and Resources Initiative, Oct 30, 2014), available at [http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL\\_Oct-21.pdf](http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf) [accessed Aug 10, 2017].
- <sup>213</sup> *Indonesia: Food Security and Land Governance Factsheet* (LANDac, Royal Tropical Institute (KIT), 2014), available at <http://www.landgovernance.org/assets/2014/09/Indonesia-Factsheet-20121.pdf> [accessed Aug 10, 2017].
- <sup>214</sup> Id.
- <sup>215</sup> Id.
- <sup>216</sup> Heryani and Grant, *Land Administration in Indonesia* (cited in note 209).
- <sup>217</sup> Id.
- <sup>218</sup> Id.
- <sup>219</sup> *Indonesia: Food Security and Land Governance Factsheet* at 3–5 (cited in note 213).
- <sup>220</sup> Id.
- <sup>221</sup> Heryani and Grant, *Land Administration in Indonesia* (cited in note 209).
- <sup>222</sup> USAID, *Indonesia* (cited in note 210).

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- <sup>226</sup> Jennifer Link, *Land Registration and Property Rights in Iraq 2* (USAID Iraq Local Governance Program, Jan 2005).
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- <sup>228</sup> Id at 4.
- <sup>229</sup> Id at 4.
- <sup>230</sup> *Iraqi Property Claims Programme 1* (International Organization for Migration 2014).
- <sup>231</sup> Peter Van der Auweraert, *Property Restitution in Iraq 2* (Presentation at the Symposium on Post-Conflict Property Resolution hosted by the United States Department of State, Sept 6–7, 2007).
- <sup>232</sup> Id at 2–3.
- <sup>233</sup> Deborah Isser and Peter Van der Auweraert, *Land, Property, and the Challenge of Return for Iraq's Displaced 2* (United States Institute of Peace, 2009).
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- <sup>235</sup> Link, *Land Registration and Property Rights in Iraq* at 4 (cited in note 226).
- <sup>236</sup> *Iraq Crisis: Timeline Since 2003 US Invasion* (Telegraph, June 11, 2014), available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10891635/Iraq-crisis-timeline-since-2003-US-invasion.html> [accessed Aug 10, 2017].
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- <sup>238</sup> Isser and Van der Auweraert, *Land, Property, and the Challenge of Return for Iraq's Displaced* at 2 (cited in note 233).
- <sup>239</sup> Van der Auweraert, *Property Restitution in Iraq* at 3 (cited in note 231).
- <sup>240</sup> Id at 2.
- <sup>241</sup> *Iraqi Property Claims Programme* (cited in note 230).
- <sup>242</sup> Id.
- <sup>243</sup> Van der Auweraert, *Property Restitution in Iraq* at 4 (cited in note 231).
- <sup>244</sup> Id.
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- <sup>246</sup> Isser and Van der Auweraert, *Land, Property, and the Challenge of Return for Iraq's Displaced* at 6 (cited in note 233).
- <sup>247</sup> *Iraqi Property Claims Programme* (cited in note 230).
- <sup>248</sup> Van der Auweraert, *Property Restitution in Iraq* at 7 (cited in note 231).
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- <sup>251</sup> Id.
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- <sup>259</sup> Isser and Van der Auweraert, *Land, Property, and the Challenge of Return for Iraq's Displaced* at 9 (cited in note 233).
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- <sup>261</sup> Van der Auweraert, *Property Restitution in Iraq* at 7 (cited in note 231).
- <sup>262</sup> *Id* at 4.
- <sup>263</sup> *Id* at 4.
- <sup>264</sup> *Id* at 4.
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- <sup>267</sup> *Id* at 7.
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- <sup>269</sup> Sandra F. Joireman, *Resigning their Rights? Impediments to Women's Property Ownership in Kosovo*, in E.B. Zoomers and Caroline S. Achambault. Eds, *Global Trends in Land Tenure Reform: Gender Impacts* 237, 238 (Routledge 2015).
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- <sup>281</sup> Hartvigsen, *Land Reform in Central and Eastern Europe* at 36 (cited in note 273).
- <sup>282</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 434 (cited in note 168).
- <sup>283</sup> Morten Hartvigsen, *Land Reform and Law Fragmentation in Central and Eastern Europe*, 36 *Land Use Pol'y* 330, 333 (2014).
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- <sup>285</sup> Hartvigsen, *Land Reform and Law Fragmentation* at 333 (cited in note 283).
- <sup>286</sup> *Id*.
- <sup>287</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 423 (cited in note 168).
- <sup>288</sup> *Id* at 427–28.
- <sup>289</sup> *Conflicting Jurisdiction in Property Disputes (Monthly Report – April 2009)* \* 2 (OSCE: Department of Human Rights and Communities, Legal System Monitoring Section, 2009), available at <http://www.osce.org/kosovo/37717?download=true> [accessed Aug 10, 2017].
- <sup>290</sup> *Id*.
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<sup>293</sup> *Challenges in the Resolution of Conflict-Related Property Claims in Kosovo* \*5 (OSCE Mission in Kosovo, June 2011), available at <http://www.osce.org/kosovo/80435?download=true> [accessed Aug 10, 2017].

<sup>294</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 431 (cited in note 168).

<sup>295</sup> *Id.* at 432.

<sup>296</sup> *Id.* at 428.

<sup>297</sup> *Id.* at 429–30.

<sup>298</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 430 (cited in note 168).

<sup>299</sup> OSCE, *Conflicting Jurisdiction in Property Disputes* at 2 (cited in note 289).

<sup>300</sup> *Kosovo Property Rights Program* (USAID, 2014), available at <https://www.land-links.org/project/kosovo-property-rights-program/> [accessed Aug 10, 2017].

<sup>301</sup> *Id.*

<sup>302</sup> Marco Roccia, *Reforming Property Law in Kosovo: A Clash of Legal Orders*, 23 *Eur Rev* 566, 570–71 (2015).

<sup>303</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 433 (cited in note 168).

<sup>304</sup> *Id.* at 433.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 434.

<sup>307</sup> Arraiza and Moratti, *Getting the Property Questions Right* at 434 (cited in note 168).

<sup>308</sup> OSCE, *Conflicting Jurisdiction in Property Disputes* at 3 (cited in note 289).

<sup>309</sup> *History of Zimbabwe* (Embassy of Zimbabwe, 2016), available at <http://www.zimembassy.se/history.html> [accessed Aug 10, 2017].

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Zimbabwe Government and Farmers Locked in Land Reform Dispute* (Human & Constitutional Rights, Mar 26, 2008), available at <http://www.hrcr.org/hottopics/zimbabwe.html> [accessed Aug 10, 2017].

<sup>313</sup> Annie Schleicher, *Zimbabwe’s Land Program* (Online News Hour, Apr 14, 2004), available at [https://web.archive.org/web/20040501103309/http://www.pbs.org/newshour/bb/africa/land/gp\\_zimbabwe.html](https://web.archive.org/web/20040501103309/http://www.pbs.org/newshour/bb/africa/land/gp_zimbabwe.html) [accessed Aug 10, 2017].

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> See John Dzimba, *South African’s Destabilization of Zimbabwe, 1980-1989*, 82 (2008).

<sup>317</sup> Schleicher, *Zimbabwe’s Land Program* (cited in note 313).

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> See *Land Reform in Zimbabwe in the 20 Years After Independence* (Human Rights Watch, 2002), available at <https://www.hrw.org/reports/2002/zimbabwe/> [accessed Aug 10, 2017].

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Zimbabwe: Power & Hunger—Violations of the Right to Food* \* 20 (Amnesty International, (2004).

<sup>326</sup> *Id.* at 12.

<sup>327</sup> *Id.* at 20.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 20.

<sup>330</sup> *Id.* at 12.

<sup>331</sup> *Id.*

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- <sup>336</sup> See Part V.3 and V.6.
- <sup>337</sup> See Part V.7.
- <sup>338</sup> Katayanagi, *Property Rights* at 134 (cited in note 155).
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- <sup>341</sup> Van der Auweraert, *Property Restitution in Iraq* at 6–7 (cited in note 231).
- <sup>342</sup> Fitzpatrick, *Mediating Land Conflict in East Timor* at 181 (cited in note 200).
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- <sup>344</sup> *Id.* at 175–80; Katayanagi, *Property Rights* at 144 (cited in note 155).
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- <sup>347</sup> Oxfam Learning Roundtable on Land Restitution (cited in note 40).
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- <sup>352</sup> Katayanagi, *Property Rights* at 138–39 (cited in note 155).
- <sup>353</sup> Carson, Carson, *East Timor's Land Tenure Problems* at 400–04 (cited in note 191).
- <sup>354</sup> Davies, *Restitution of Land and Property Rights* at 81 (cited in note 180); Isser and Van der Auweraert, *Land, Property, and the Challenge of Return for Iraq's Displaced* at 6 (cited in note 233).
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- <sup>357</sup> IHRG interview with Land Core Group (Mar 20, 2017) (on file with author).
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